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15 *Attorneys for Defendant: Otto Trucking LLC*

**UNREDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 Waymo LLC,

20 Plaintiff,

21 v.

22 Uber Technologies, Inc.; Ottomotto LLC; Otto
Trucking LLC,

23 Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANT OTTO TRUCKING LLC'S
OPPOSITION TO PLAINTIFF WAYMO
LLC'S MOTION TO EXCLUDE OTTO
TRUCKING'S DAMAGES EXPERT
JAMES MALACKOWSKI PURSUANT TO
RULE 702 AND DAUBERT**

Date: September 27, 2017
Time: 8:00 a.m.
Courtroom: 8 (19th Floor)
Judge: Hon. William Alsup
Trial: October 10, 2017

Filed/Lodged Concurrently with:
1. Declaration of Neel Chatterjee

I. INTRODUCTION

Otto Trucking respectfully requests that the Court deny Waymo's motion to exclude Otto Trucking's damages expert, James Malackowski. Mr. Malackowski is a preeminent licensing and damages expert with 30 years of experience. Waymo does not challenge Mr. Malackowski's qualifications. Nor does Waymo even attempt to discuss the record evidence and reasoning that support Mr. Malackowski's damages opinions. Instead, Waymo asks the Court to exclude Mr. Malackowski's damages opinions related to Otto Trucking based solely on the ground that his opinions are allegedly improper legal conclusions.¹ Waymo is incorrect.

In this litigation — indeed, in its current motion — Waymo has openly admitted that it has no specific damages theory as related to Otto Trucking. *See* Waymo's Motion to Exclude Otto Trucking's Damages Expert James Malackowski Pursuant to Rule 702 and *Daubert* ("Mot."), at 4. Consistent with this admission, Waymo's expert, Michael Wagner, sets forth damages opinions for unjust enrichment and reasonable royalty based only on facts relating to Uber and Ottomotto — not Otto Trucking. For Otto Trucking, Mr. Wagner readily admits he cannot quantify any damages, royalties or unjust enrichment. In his deposition, Mr. Wagner went so far as to say he has not even investigated whether any compensation is due. In response to Mr. Wagner's report, Mr. Malackowski explains that (1) there should be no separate damages against Otto Trucking for any alleged misappropriation and, relatedly, (2) Mr. Wagner has failed to address any separate recovery from Otto Trucking. These are not legal conclusions, and there really should be no dispute that Mr. Malackowski is permitted to analyze and criticize the methodology of Waymo's experts.

Despite no evidence of any calculation by Mr. Wagner, Waymo nevertheless takes issue with Mr. Malackowski's opinions because he does not address its purported damages theories based on joint and several liability and vicarious liability. *See id.* Oddly enough, these liability issues are legal issues that Mr. Malackowski properly did not address (and that have already been presented to the Court, *see* Dkt. No. 1423 at 19-20; Dkt. No. 1637 at 8-14) (briefing on Otto Trucking's summary

¹ Mr. Malackowski's report contains additional opinions relating to (a) the unreliability of Mr. Wagner's unjust enrichment opinions, (b) Mr. Wagner's failure to demonstrate that a permanent injunction is appropriate, and (c) the unreliability of the opinions of Waymo's other expert, Jim Timmins. Waymo has not sought to exclude any of these opinions.

judgment motion)). Indeed, Waymo's own expert Mr. Wagner does not discuss joint and several liability or vicarious liability in his report. It thus appears that Waymo, through this motion, is improperly attempting to have these legal liability issues adjudged in its favor. But it is well-settled that a *Daubert* motion cannot be used in this fashion. *See, e.g., Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525 PSG (PJWx), 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010) ("[M]otions *in limine* should not be used as disguised motions for summary judgment.").

In short, Mr. Malackowski's opinions are both based on the specific facts of this case and responsive to Mr. Wagner's report. These opinions are within the purview of Rule 702 and should be heard by a jury in open court. Waymo's motion should be denied.

II. MR. MALACKOWSKI'S OPINIONS

Mr. Malackowski sets forth two opinions in his expert report related to damages as to Otto Trucking: (1) there should be no separate damages recovery from Otto Trucking, *see* Declaration of Neel Chatterjee ("Chatterjee Decl."), Ex. 1 ("Malackowski Rept.") at 41-43; and (2) Waymo's expert, Mr. Wagner, fails to separately address monetary recovery from Otto Trucking, *see id.* at 43-50.

First, Mr. Malackowski opines that there should be no separate recovery against Otto Trucking. He explains that, under the facts of this case, any recovery against Uber or Ottomotto will resolve Waymo's claims such that Waymo will be fully compensated for any alleged misappropriation. In particular, Mr. Malackowski discusses three possible factual scenarios in the case:

Regardless of the outcome of this litigation, it will satisfy Waymo's claim against Otto Trucking. First, should Waymo prevail on the merits of this case and be granted an injunction, Uber will be precluded from utilizing the subject matter of the asserted trade secrets, and the AV-related technology licensed from Uber to Otto Trucking would consequently exclude the asserted trade secrets.

Second, if Waymo prevails on the merits of this case but is denied an injunction, the monetary recovery Waymo receives from Uber would satisfy Waymo with respect to all uses Uber makes of the alleged trade secrets, including those of its non-exclusive licensee, Otto Trucking. As set forth above, there is no record evidence that Otto Trucking has or will achieve any cost savings of its own relating to the alleged use of the asserted trade secrets.

1 Third, if Waymo loses on the merits of this case, then the fact finder would have
 2 concluded that neither Uber or Otto Trucking misappropriated the alleged trade
 3 secrets, and no recovery will be due Waymo from Uber or Otto Trucking.

4 *Id.* at 43.

5 Second, Mr. Malackowski details how Mr. Wagner failed to address separate monetary
 6 recovery from Otto Trucking. Mr. Malackowski first directs attention to Mr. Wagner's assertion that
 7 there are certain measures of damages for Otto Trucking that he could not quantify:

8 The Wagner Report fails to address monetary recovery from Otto Trucking.
 9 According to Mr. Wagner:

10 "other benefits to Defendants that I cannot quantify at this time include:

- 11 • The unjust enrichment to Otto Trucking based on the potential consideration
 to be paid if Uber exercises its option to acquire Otto Trucking.
- 12 • The unjust enrichment to Otto Trucking or Uber based on employing LiDAR
 13 systems with reduced expenses in the future..."

14 *Id.* at 43 (quoting Wagner Rept. at 121). Mr. Malackowski further explains that, in addition to these
 15 excluded calculations, Mr. Wagner's unjust enrichment and reasonable royalty calculations do not
 16 take into account any facts related to Otto Trucking. *See id.* at 43 ("Wagner also failed to address
 17 Otto Trucking in either of his alternative measures of unjust enrichment."), 44 ("Mr. Wagner
 18 likewise fails to address Otto Trucking in his reasonable royalty analysis[.]"). As Mr. Malackowski
 19 points out, "[t]he introduction to Mr. Wagner's unjust enrichment analysis in fact confirms that his
 20 analyses do not relate to Otto Trucking":

21 "I discuss and quantify unjust enrichment to Uber measured in two alternative ways:
 22 measured by accelerated AV development and measured by saved development
 23 expenses. I also discuss unjust enrichment to Ottomotto measured by the acquisition
 by Uber. I also discuss other ways in which the Defendants have been unjustly
 enriched that I'm unable to quantify at this time."

24 *Id.* at 43-44 (quoting Wagner Rept. at 103-104; emphasis in Malackowski Rept.).

25 Mr. Wagner has since confirmed at deposition that he did no separate work or analysis as to
 26 Otto Trucking. *See* Chatterjee Decl., Ex. 2 (Wagner Rough Dep. Tr.) at 123:25-124:4 ("Q. Okay.
 27 You're not offering any opinions in this case as to any damages caused to Waymo specific to [] Otto
 28 Trucking; is that right? A. That's correct."), 135:7-11 ("Q. Approximately what percentage of your

64 hours, Mr. Wagner, did you spend focusing on calculating damages specific to my client, Otto Trucking? A. Zero.”), 131:7-11 (“Q. You didn’t do any separate calculation of the amount that Otto Trucking would have agreed to pay Waymo at a hypothetical negotiation set during that same time period, correct? A. That is accurate.”).

III. ARGUMENT

Mr. Malackowski’s expert opinions are based upon his extensive prior experience, tied directly to facts of the case, and directly responsive to Mr. Wagner’s damages opinions. Moreover, Mr. Malackowski’s responsive opinions are precisely the types of opinions contemplated by the Federal Rules. *See, e.g., Nehara v. California*, No. 1:10-CV-00491 JLT, 2013 WL 5670867, at *2 (E.D. Cal. Oct. 16, 2013) (“A party may file a ‘rebuttal’ expert report to ‘contradict or rebut evidence’ offered by another party in its initial expert disclosures.”) (citing Fed. R. Civ. P. 26(a)(2)(D)(ii)). Mr. Malackowski should be permitted to testify before the jury as to these opinions, as such testimony will assist the jury in understanding Mr. Wagner’s opinions as well as the evidence (or lack thereof) that Waymo sets forth to support its damages against Otto Trucking. *See* Fed. R. Evid. 702.

Setting aside its broad complaints of improper legal conclusions, Waymo fails to provide any specific analysis as to how Mr. Malackowski’s opinions constitute legal conclusions. Waymo’s single cited case, *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051 (9th Cir. 2008), highlights the deficiencies in its “legal conclusion” argument. In that case, the expert’s excluded testimony all related to improper recitations and applications of the law. The district court excluded the following legal explanations and conclusions :

(1) sections that discuss the UCC and/or apply the UCC to the facts of this case; (2) sections that discuss non-UCC law and/or apply non-UCC law to the facts of this case; (3) sections that discuss agency law and/or apply agency law to the facts of this case; (4) sections that discuss the parties’ legal rights, duties, and obligations under the law; (5) sections that label the parties’ actions as “wrongful” or “intentional” under the law; and (6) sections that discuss the appropriate formula to calculate damages under the law.

Id. at 1058. Here, in contrast, Mr. Malackowski does not recite or explain any laws in his expert report, nor does he attempt to apply any laws. And Waymo certainly has not identified any such

laws in its motion. To the contrary, as discussed above, Mr. Malackowski's report is limited to interpretation of the facts of this case and the theories presented in the Wagner report.

Waymo's arguments related to joint and several liability and vicarious liability can be summarily dismissed. *See* Mot. at 4-5. Those legal issues are not discussed by either parties' damages expert and are entirely unrelated to Mr. Malackowski's qualifications or the soundness of his methodology under Rule 702 or *Daubert*. Waymo can litigate the merits of its liability theories outside the context of a *Daubert* motion.

IV. CONCLUSION

For the reasons set forth above, Waymo's motion to exclude Mr. Malackowski should be denied.

Dated: September 22, 2017

Respectfully submitted,

By: /s/ Neel Chatterjee
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Attorneys for Defendant: Otto Trucking LLC

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document including all of its attachments with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **September 22, 2017**. I further certify that all participants in the case are registered CM/ECF users and that service of the publicly filed documents will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **September 22, 2017**.

/s/ Neel Chatterjee
NEEL CHATTERJEE

EXHIBIT 2

***UNREDACTED VERSION
OF DOCUMENT
SOUGHT TO BE SEALED***

EXHIBIT 2

2714429AMG.txt

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

2

09:34:28 3 THE VIDEOGRAPHER: Good morning. We are
09:34:29 4 going on the record at 9:34, on September 22 of the
09:34:35 5 Year 2017. Please understand microphones are very
09:34:42 6 sensitive, and they may pick up whispering ad
09:34:44 7 private conversations and cellular interference.

09:34:49 8 Please turn off your cell phones or place
09:34:51 9 them away from the microphones, as they may
09:34:54 10 interfere with the audio. Audio and video recording
09:34:57 11 will continue to take place unless all parties agree
09:35:01 12 to go off of the record.

09:35:03 13 This is Disc 1, Volume I in the video
09:35:06 14 deposition of Michael J. Wagner, taken by counsel
09:35:10 15 for Defendants in the matter of Waymo LLC v. Uber
09:35:16 16 Technologies. It's filed in the United States
09:35:19 17 District Court, for the Northern District of
09:35:21 18 California, Case No. 17-cv-00939-WHA.

09:35:29 19 This is being taken at Morrison &
09:35:31 20 Foerster. They're at 425 Market Street in
09:35:35 21 San Francisco. My name is Kevin Foor, and I am here
09:35:40 22 with Mary Goff-Sharma, and we are from Veri text.
09:35:45 23 I'm not related to any party nor am I financially
09:35:49 24 interested in the outcome in any way.

09:35:52 25 Counsel and -- and all present in the

1

2714429AMG.txt
12:08:16 23 Otto Trucking LLC. Do you know who Otto Trucking
12:08:18 24 is?
12:08:19 25 A I do.

123

1 ROUGH ASCII--NOT FINAL CERTIFIED TRANSCRIPT
12:08:20 2 Q Who is Otto what's your understanding of
12:08:22 3 what Otto Trucking is?
12:08:23 4 A Well, I -- I believe it's a company that's
12:08:25 5 owned by -- principally owned by Mr. Levandowski and
12:08:32 6 Lior.
12:08:34 7 And it is in -- has signed an -- an
12:08:37 8 acquisition of purchase agreement with Uber where it
12:08:43 9 it's Uber's discretion to purchase that company
12:08:46 10 between now and sometime in November. And it is a
12:08:49 11 company that is focused on applying LiDAR technology
12:08:53 12 to trucks.
12:08:56 13 Q Do you know whether Otto Trucking has any
12:08:58 14 employees?
12:08:59 15 A Well, my understanding is they do not at
12:09:01 16 least from the last facts that I have.
12:09:04 17 Q Do you have any understanding of as to
12:09:04 18 whether Otto Trucking does any research and
12:09:07 19 development activities?
12:09:12 20 A I -- I I don't know whether they do or not
12:09:16 21 I understand that Uber is advancing development
12:09:18 22 funds to them. So I -- I would think they do. But
12:09:22 23 whether that's done with actually being done by Uber
12:09:26 24 and not your client, I don't know.

2714429AMG.txt

12: 09: 29 25 Q Okay. You're not offering any opinions in

124

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

12: 09: 31 2 this case as to any damages caused to Waymo specific

12: 09: 36 3 to oath Otto Trucking; is that right?

12: 09: 38 4 A That's correct.

12: 09: 38 5 Q Okay. And so then your damages -- I'm

12: 09: 44 6 going to walk through briefly -- not in the level of

12: 09: 46 7 detail that Uber's counsel did -- but I just want to

12: 09: 48 8 walk through your principal opinions in this case.

12: 09: 50 9 You have offered two unjust enrichment

12: 09: 55 10 unjust enrichment calculations and a reasonable

12: 09: 58 11 royalty measure, correct?

12: 10: 00 12 A That's fair.

12: 10: 01 13 Q Okay. The first unjust enrichment measure

12: 10: 05 14 values the accelerated development to -- that Uber

12: 10: 10 15 was able to achieve through the alleged

12: 10: 13 16 misappropriation of these nine trade secrets, right?

12: 10: 16 17 A Yes.

12: 10: 17 18 Q And -- and your opinion -- that -- we'll

12: 10: 20 19 call that your first unjust enrichment opinion.

12: 10: 24 20 That opinion is based upon internal Uber

12: 10: 28 21 documents showing some accelerated development,

12: 10: 31 22 correct?

12: 10: 32 23 A That's fair.

12: 10: 34 24 Q That opinion is not based upon any Otto

12: 10: 36 25 Trucking documents; is that right?

2714429AMG.txt

12:16:07 8 that word -- the caveats you're referring to
12:16:09 9 regarding the applicability of your unjust
12:16:12 10 enrichment damage theories, those caveats are Uber
12:16:17 11 acquires Otto Trucking and that Uber shares some of
12:16:21 12 the technology it's developing using the allegedly
12:16:25 13 misappropriated trade secrets with Otto Trucking; is
12:16:28 14 that right?

12:16:28 15 A That's -- that's -- again, that's my
12:16:30 16 conclusion -- or that would be my opinion as a
12:16:33 17 damages expert.

12:16:33 18 Q If both of those assumptions are true,
12:16:36 19 then your damages opinions -- your unjust enrichment
12:16:39 20 damages opinions may have some applicability to Otto
12:16:41 21 Trucking, correct?

12:16:44 22 MR. EISEMAN: Objection as to form.

12:16:44 23 A That's fair.

12:16:49 24 Q (BY MR. BERRY) You also have a reasonable
12:16:53 25 royalty rate calculation. And that measures the

131

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

12:16:55 2 amount that Uber would have agreed to pay Waymo in
12:16:58 3 this hypothetical negotiation set in the --
12:17:01 4 somewhere in the December 15 -- August -- between
12:17:05 5 December '15 and August 2016 time period, right?

12:17:09 6 A Correct?

12:17:09 7 Q You didn't do any separate calculation of
12:17:11 8 the amount that Otto Trucking would have agreed to
12:17:15 9 pay Waymo at a hypothetical negotiation set during

2714429AMG.txt

12:17:20 10 that same time period, correct?

12:17:22 11 A That is accurate.

12:17:23 12 Q Okay. And then for the reasonable royalty
12:17:25 13 calculation that you did, you start with a baseline
12:17:28 14 of Uber's unjust enrichment. And then you adjusted
12:17:32 15 upward based on some analysis you have done of
12:17:36 16 certain of the Georgia-Pacific factors. Namely 4,
12:17:38 17 5, 6, 8, and 11, correct?

12:17:42 18 A Those are the only ones that had any
12:17:45 19 impact on changing the number from the baseline.
12:17:47 20 That is correct.

12:17:48 21 Q And -- and Factor 5 -- this is addressed
12:17:52 22 in your report at paragraphs 399 to 401 -- that --
12:17:55 23 that factor deals with the commercial relationship
12:17:58 24 between Waymo and Uber and some documents that you
12:18:02 25 referred regarding the -- the potential competitive

132

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

12:18:08 2 relationship between those two companies, right?

12:18:10 3 A Yes.

12:18:11 4 Q That analysis in Factor 5 is -- is
12:18:13 5 inapplicable to -- to my client Otto Trucking --

12:18:16 6 A Yeah --

12:18:16 7 Q -- right?

12:18:16 8 A -- as discussed in my report, that is
12:18:19 9 correct.

12:18:20 10 Q Right. And -- and Factor 8 deals with
12:18:25 11 expected future profitability. And you analyzed

2714429AMG.txt

12:20:30 16 Q So as we sit here today based on the work
12:20:33 17 you have done so far up to and including today, you
12:20:36 18 don't have an opinion of what damages Waymo would be
12:20:39 19 entitled to under that hypothetical verdict --
12:20:41 20 MR. EISEMAN: Objection.
12:20:41 21 Q -- is that fair (talking over each other
12:20:42 22 -- check *)?
12:20:43 23 MR. EISEMAN: Objection as to form.
12:20:43 24 A I do not.
12:20:44 25 Q (BY MR. SCHUMAN) In -- in response to some

135

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT
12:20:50 2 of the questions you got from Uber's counsel, you --
12:20:55 3 you mentioned that you personally spent
12:20:58 4 approximately 64 hours total working on -- working
12:21:01 5 on your opinions in this case. Obviously, your
12:21:04 6 staff spent many more hours than that.
12:21:06 7 Approximately what percentage of your
12:21:09 8 64 hours, Mr. Wagner, did you spend focusing on
12:21:14 9 calculating damages specific to my client, Otto
12:21:16 10 Trucking?
12:21:17 11 A Zero.
12:21:25 12 Q Just bear with me a second.
12:21:27 13 A But I could approximate -- it's exactly
12:21:31 14 64.0 hours through September 15. And it's been 13.4
12:21:39 15 hours since then before today
12:21:39 16 Q I would --
12:21:40 17 A -- between September 15 and today (talking
Page 127

UNREDACTED
VERSION OF EXHIBIT 1
SOUGHT TO BE FILED
UNDER SEAL IN ITS
ENTIRETY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
vs.) Case No.
UBER TECHNOLOGIES, INC.;) 17-cv-00939-WHA
OTTOMOTTO, LLC; OTTO TRUCKING LLC,)
Defendants.)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF MICHAEL J. WAGNER
San Francisco, California
Friday, September 22, 2017
Volume I

Reported by:
MARY J. GOFF
CSR No. 13427
Job No. 2714429

PAGES 1-145

Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
vs.) Case No.
UBER TECHNOLOGIES, INC.;) 17-cv-00939-WHA
OTTOMOTTO, LLC; OTTO TRUCKING LLC,)
Defendants.)
_____)

HIGHLY CONFIDENTIAL

Videotaped Deposition of MICHAEL J. WAGNER,
Volume I, taken on behalf of Defendants,
at Morrison & Foerster, 425 market Street,
33rd Floor, San Francisco, beginning at
9:34 a.m. and ending at 12:30 p.m., on
September 22, 2017, before MARY GOFF, Certified
Shorthand Reporter No. 13427.

1 A Yeah, but I -- he thinks -- he thinks my 12:07:51
2 profile is not as good as my straight face. 12:07:53
3 THE VIDEOGRAPHER: What he said. Do you 12:07:57
4 want to stay on or -- we can stay on. 12:07:59
5 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:08:03
6 BY MR. SCHUMAN: 12:08:04
7 Q All right. Good afternoon, Mr. Wagner. 12:08:07
8 A Good afternoon, Mr. Schuman. 12:08:10
9 Q Mr. Wagner, I represent a company called 12:08:14
10 Otto Trucking LLC. Do you know who Otto Trucking 12:08:16
11 is? 12:08:18
12 A I do. 12:08:19
13 Q Who is Otto -- what's your understanding 12:08:20
14 of who Otto Trucking is? 12:08:21
15 A Well, I -- I believe it's a company that's 12:08:23
16 owned by -- principally owned by Mr. Levandowski and 12:08:25
17 Lior. 12:08:32
18 And it is in -- has signed an -- an 12:08:34
19 acquisition of purchase agreement with Uber where 12:08:37
20 it -- it's Uber's discretion to purchase that 12:08:42
21 company between now and sometime in November. And 12:08:45
22 it is a company that is focused on applying LiDAR 12:08:48
23 technology to trucks. 12:08:52
24 Q Do you know whether Otto Trucking has any 12:08:56
25 employees? 12:08:58

1	A	Well, my understanding is they do not, at	12:08:59
2		least from the last facts that I have.	12:09:01
3	Q	Do you have any understanding as to	12:09:04
4		whether Otto Trucking does any research and	12:09:04
5		development activities?	12:09:07
6	A	I -- I -- I don't know whether they do or	12:09:12
7		not. I understand that Uber is advancing	12:09:15
8		development funds to them, so I -- I would think	12:09:18
9		they do. But whether that's done with -- actually	12:09:21
10		being done by Uber and not your client, I -- I don't	12:09:25
11		know.	12:09:28
12	Q	Okay. You're not offering any opinions in	12:09:29
13		this case as to any damages caused to Waymo specific	12:09:31
14		to Otto Trucking; is that right?	12:09:36
15	A	That's correct.	12:09:38
16	Q	Okay. And so then your damages -- I'm	12:09:38
17		going to walk through briefly -- not in the level of	12:09:44
18		detail that Uber's counsel did, but I just want to	12:09:46
19		walk through your -- your principal opinions in this	12:09:48
20		case.	12:09:50
21		You have offered two unjust enrichment	12:09:50
22		calculations and a -- and a reasonable royalty	12:09:55
23		measure, correct?	12:09:59
24	A	That's fair.	12:10:00
25	Q	Okay. The first unjust enrichment measure	12:10:01

1 values the accelerated development to -- that Uber 12:10:05
2 was able to achieve through the alleged 12:10:10
3 misappropriation of these nine trade secrets, right? 12:10:13
4 A Yes. 12:10:16
5 Q And -- and your opinion -- that -- we'll 12:10:17
6 call that your first unjust enrichment opinion. 12:10:20
7 That opinion is based on internal Uber 12:10:24
8 documents showing some accelerated development, 12:10:28
9 correct? 12:10:31
10 A That's fair. 12:10:32
11 Q That opinion is not based on any Otto 12:10:34
12 Trucking documents; is that right? 12:10:36
13 A It is not. 12:10:40
14 Q So would you agree with me then that your 12:10:42
15 first unjust -- unjust enrichment theory is not 12:10:45
16 applicable to Otto Trucking? 12:10:48
17 MR. EISEMAN: Objection as to form. 12:10:50
18 A You know, I -- what I would say is that 12:10:51
19 unless Uber exercises its option to purchase Otto 12:10:56
20 Trucking or shares this accelerated depreciation -- 12:11:01
21 or accelerated development with Otto Trucking, then 12:11:04
22 my calculations have nothing to do with your client. 12:11:10
23 Q (BY MR. SCHUMAN) Right. And as we sit 12:11:15
24 here today, you know that Uber has not exercised the 12:11:15
25 option to the purchase Otto Trucking, right? 12:11:18

1 A I -- I don't know that. But those facts 12:11:21
2 have not been brought to my attention. And if it 12:11:23
3 had happened, I fully expect I would be aware of it. 12:11:26
4 Q Right. And the accelerated -- sharing the 12:11:30
5 accelerated development with Otto Trucking, what did 12:11:33
6 you mean by that? 12:11:36
7 A Well, if -- if -- if as a result of Uber 12:11:36
8 accelerating development of LiDAR on their veh -- on 12:11:43
9 their vehicles for their transportation as a 12:11:46
10 service, they -- they're also -- then by Otto 12:11:48
11 Trucking -- and Otto Trucking is going to get into 12:11:51
12 the market one or two years earlier than they 12:11:54
13 otherwise would -- then I think it might be 12:11:58
14 appropriate to your client. But unless those facts 12:12:00
15 occur, what I have calculated has nothing to do with 12:12:03
16 your client. 12:12:05
17 Q All right. And as we sit here today, you 12:12:06
18 do know that those facts that you have just in your 12:12:07
19 last answer summarized have not occurred yet, right? 12:12:10
20 A That's correct. 12:12:13
21 Q Your second unjust enrichment calculation 12:12:14
22 is based on the cost that -- that you have opined 12:12:16
23 Uber saved in its development of autonomous vehicles 12:12:20
24 through alleged use of these nine trade secrets, 12:12:25
25 right? 12:12:29

Page 130

1 Q Okay. Did -- on the list of materials you 12:13:36
2 reviewed or at least considered is the Brent Schwarz 12:13:39
3 deposition. 12:13:44
4 Do you recall reviewing any portions of 12:13:45
5 Mr. Schwarz's deposition? 12:13:47
6 A I personally do not. 12:13:48
7 Q You have a separate section of your 12:13:55
8 report -- and we were just covering this with Uber's 12:13:58
9 counsel -- unjust enrichment related to Trade Secret 12:14:02
10 No. 90. And I think you have an \$8 million unjust 12:14:04
11 enrichment figure for that; is -- 12:14:08
12 A Yes -- 12:14:10
13 Q -- that right? 12:14:10
14 A -- that's correct. 12:14:11
15 Q And that is -- that -- is that based on 12:14:12
16 any Otto Trucking documents or evidence? 12:14:15
17 A No. 12:14:17
18 Q Does that theory have any applicability to 12:14:18
19 Otto Trucking? 12:14:20
20 MR. EISEMAN: Objection as to form. 12:14:21
21 A You know, I -- no, again, with the same 12:14:22
22 caveats. And -- and I personally believe that my 12:14:26
23 work is only relevant unless client is -- you will 12:14:28
24 have no role at the trial, because your client will 12:14:32
25 be owned by Uber. And I assume Uber's counsel will 12:14:35

Page 131

1 be representing their interests at that point. But 12:14:38
2 I -- that's only way I see my work as relevant to 12:14:41
3 your client. 12:14:44
4 Q (BY MR. SCHUMAN) Right. So the same 12:14:49
5 caveat -- the same caveats that you're referring to 12:14:49
6 in that answer are -- are the sort of -- we'll call 12:14:51
7 them speculative future possibility that Uber 12:14:54
8 acquires Otto Trucking and shares some of these 12:14:58
9 benefits that you have quantified with Otto Trucking 12:15:01
10 in the future; is -- 12:15:04
11 MR. EISEMAN: Objection. 12:15:05
12 Q (BY MR. SCHUMAN) -- that -- 12:15:05
13 MR. EISEMAN: Objection. Sorry. 12:15:06
14 Q (BY MR. SCHUMAN) Am I -- 12:15:07
15 MR. EISEMAN: Objection as to form. 12:15:09
16 Q (BY MR. SCHUMAN) I didn't ask the question 12:15:09
17 yet. Do you understand that -- do I understand your 12:15:10
18 caveats correctly? 12:15:14
19 MR. EISEMAN: Objection as to form. 12:15:15
20 A Yes. If you took just the 12:15:16
21 word "speculative" out of your question, I would 12:15:18
22 agree with what you said. 12:15:21
23 I mean -- yeah, I don't know whether 12:15:24
24 they're going to get acquired or not. But you know, 12:15:25
25 clearly your -- your client is -- is getting a lot 12:15:27

1 of funds from Uber. Uber is forwarding -- committed 12:15:29
2 to forward a lot of funds to your client. There -- 12:15:32
3 there is a -- a deal done that your client -- client 12:15:34
4 will have to accept and Uber can force on your 12:15:38
5 client, if they want to. 12:15:41

6 I don't know what their mind-set is right 12:15:43
7 now, and I don't know how much development on the 12:15:45
8 truck has been done as to whether Uber believes it's 12:15:47
9 appropriate to purchase your client. 12:15:51

10 So I don't think it's wild speculation, 12:15:54
11 but I clearly do not know whether it will happen or 12:15:56
12 not. But then all the caveats apply. 12:16:00

13 Q (BY MR. SCHUMAN) Right. So fair enough. 12:16:03
14 Taking out the word "speculative." I know we don't 12:16:03
15 like using that word. The caveats you're referring 12:16:06
16 to regarding the applicability of your unjust 12:16:09
17 enrichment damage theories, those caveats are Uber 12:16:12
18 acquires Otto Trucking and that Uber shares some of 12:16:17
19 the technology it's developing using the allegedly 12:16:21
20 misappropriated trade secrets with Otto Trucking; is 12:16:25
21 that right? 12:16:28

22 A That's -- that's -- again, that's my 12:16:28
23 conclusion -- or that would be my opinion as a 12:16:30
24 damage expert. 12:16:33

25 Q If both of those assumptions are true, 12:16:33

1 then your damages opinions -- your unjust enrichment 12:16:36

2 damages opinions may have some applicability to Otto 12:16:39

3 Trucking, correct? 12:16:41

4 MR. EISEMAN: Objection as to form. 12:16:44

5 A That's fair. 12:16:44

6 Q (BY MR. SCHUMAN) You also have a 12:16:49

7 reasonable royalty rate calculation, and that 12:16:52

8 measures the amount that Uber would have agreed to 12:16:55

9 pay Waymo in this hypothetical negotiation set in 12:16:57

10 the -- somewhere in the December 15 -- August -- 12:17:01

11 between December '15 and August 2016 time period, 12:17:04

12 right? 12:17:08

13 A Correct. 12:17:09

14 Q You didn't do any separate calculation of 12:17:09

15 the amount that Otto Trucking would have agreed to 12:17:11

16 pay Waymo at a hypothetical negotiation set during 12:17:15

17 that same time period, correct? 12:17:20

18 A That is accurate. 12:17:22

19 Q Okay. And then for the reasonable royalty 12:17:23

20 calculation that you did, you start with a baseline 12:17:25

21 of Uber's unjust enrichment. And then you adjusted 12:17:28

22 upward based on some analysis you have done of 12:17:32

23 certain of the Georgia-Pacific factors. Namely 4, 12:17:36

24 5, 6, 8, and 11, correct? 12:17:38

25 A Those are the only ones that had any 12:17:42

1 impact on changing the number from the baseline. 12:17:45

2 That is correct. 12:17:47

3 Q And -- and Factor 5 -- this is addressed 12:17:48

4 in your report at paragraphs 399 to 401 -- that -- 12:17:52

5 that factor deals with the commercial relationship 12:17:55

6 between Waymo and Uber and some documents that you 12:17:58

7 referred regarding the -- the potential competitive 12:18:02

8 relationship between those two companies, right? 12:18:08

9 A Yes. 12:18:10

10 Q That analysis in Factor 5 is -- is 12:18:11

11 inapplicable to -- to my client Otto Trucking -- 12:18:13

12 A Yeah -- 12:18:16

13 Q -- correct? 12:18:16

14 A -- as discussed in my report, that is 12:18:16

15 correct. 12:18:19

16 Q Right. And -- and Factor 8 deals with 12:18:20

17 expected future profitability. And you analyzed 12:18:25

18 Waymo's and Uber's projections for profitability of 12:18:29

19 autonomous vehicles. 12:18:36

20 And in your view, that factor counseled in 12:18:36

21 favor of some enhancement to the baseline for the 12:18:38

22 reasonable royalty calculation, right? 12:18:42

23 A That's fair. 12:18:44

24 Q Okay. And -- and you were working with 12:18:45

25 Waymo and Uber projections there, not any 12:18:48

1 projections from Otto Trucking, right? 12:18:51

2 A Correct. I don't believe I have seen any 12:18:52

3 projections for your client -- 12:18:54

4 Q Right. 12:18:56

5 A -- and so I poss -- I could not have 12:18:56

6 possibly considered them. 12:18:58

7 Q Okay. You answered my next question, so 12:18:59

8 that'll make us go a little faster. 12:19:01

9 Factor 11 talks about the extent of the 12:19:04

10 use of the invention. This is addressed at 12:19:06

11 paragraphs 424 and 428 of your report. And again, 12:19:09

12 you find that that factor pushes the base -- the -- 12:19:12

13 the reasonable royalty baseline up a little bit 12:19:13

14 because of your assumptions based on the work of 12:19:17

15 others that -- that Uber has used these trade 12:19:21

16 secrets, right? 12:19:24

17 A Yes. 12:19:25

18 Q And you -- you have not done or are -- at 12:19:28

19 least -- have -- have you seen any evidence of any 12:19:30

20 use of any of these trade secrets by my client, Otto 12:19:33

21 Trucking? 12:19:36

22 MR. EISEMAN: Objection as to form. 12:19:37

23 A I have not. 12:19:37

24 Q (BY MR. SCHUMAN) And so your analysis of 12:19:41

25 Factor 11 is inapplicable to my client, Otto 12:19:42

Page 136

1 Trucking, right? 12:19:46

2 MR. EISEMAN: Objection as to form. 12:19:47

3 A Based on the information that I have at 12:19:48

4 this time, that is correct. 12:19:50

5 Q (BY MR. SCHUMAN) Okay. Mr. Wagner, if the 12:19:53

6 jury finds that -- and this is the hypothetical, so 12:19:55

7 it's -- follow me here. If the jury finds that Uber 12:19:57

8 and Ottomotto -- strike that. I'm going to start 12:20:01

9 over. 12:20:05

10 Hypothetical: If at trial in this case 12:20:05

11 the jury finds in favor of Uber -- Uber and 12:20:06

12 Ottomotto -- so a defense verdict for them -- but 12:20:10

13 against Otto Trucking on liability, what's your 12:20:13

14 opinion as to the damages that Waymo would be 12:20:17

15 entitled to as to my client, Otto Trucking? 12:20:20

16 MR. EISEMAN: Objection as to form. 12:20:23

17 A I would need more facts to know if there's 12:20:24

18 any relevance of what I have done would apply to 12:20:25

19 your client in that hypothetical. 12:20:28

20 Q (BY MR. SCHUMAN) So as you sit here today 12:20:30

21 based on the work you have done so far up to and 12:20:32

22 including today, you don't have an opinion of what 12:20:35

23 damages Waymo would be entitled to under that 12:20:38

24 hypothetical verdict -- 12:20:40

25 MR. EISEMAN: Objection. 12:20:41

Page 137

1 Q (BY MR. SCHUMAN) -- is that fair? 12:20:41

2 MR. EISEMAN: Objection as to form. 12:20:43

3 A I do not. 12:20:43

4 Q (BY MR. SCHUMAN) In -- in response to some 12:20:44

5 of the questions you got from Uber's counsel, you -- 12:20:50

6 you mentioned that you personally spent 12:20:55

7 approximately 64 hours total working on -- working 12:20:58

8 on your opinions in this case. Obviously, your 12:21:01

9 staff spent many more hours than that. 12:21:04

10 Approximately what percentage of your 12:21:06

11 64 hours, Mr. Wagner, did you spend focusing on 12:21:09

12 calculating damages specific to my client, Otto 12:21:14

13 Trucking? 12:21:16

14 A Zero. 12:21:17

15 Q Just bear with me a second. 12:21:25

16 A But I could -- the approximate -- it's 12:21:27

17 exactly 64.0 hours through September 15. And it's 12:21:30

18 been 13.4 hours since then before today. 12:21:36

19 Q I would -- 12:21:39

20 A -- between September 15 and today. 12:21:40

21 Q In response to some questions from Uber's 12:21:44

22 counsel, I think you made clear that your damages 12:21:45

23 are based on Uber's use of -- alleged use of the 12:21:46

24 trade secrets in its development of its autonomous 12:21:53

25 vehicles. 12:21:56

1 If the evidence at trial shows that my 12:22:01
2 client, Otto Trucking, has not used any of those 12:22:04
3 trade secrets, would you agree with me that your 12:22:07
4 opinions are irrelevant to Otto Trucking? 12:22:10
5 MR. EISEMAN: Objection as to form. 12:22:13
6 A I'm not giving you a legal opinion. But 12:22:16
7 as -- my judgment as a damage expert, you are 12:22:17
8 correct. 12:22:20
9 Q (BY MR. SCHUMAN) You mentioned that you 12:22:29
10 had documents in this case from Uber with its own 12:22:31
11 modeling of the benefits of -- of -- well, let me -- 12:22:38
12 let me ask it -- strike that. Let me start that 12:22:44
13 question again. 12:22:47
14 Do you remember some testimony you gave in 12:22:48
15 response to Uber's counsel where you characterized 12:22:49
16 some of the information you got from -- that you 12:22:52
17 were able to review from Uber as the Rosetta Stone 12:22:55
18 in your field? 12:22:57
19 Do you remember that -- 12:22:59
20 A I -- 12:22:59
21 Q -- testimony? 12:22:59
22 A -- do remember that. 12:23:00
23 Q And -- and what is the information again 12:23:01
24 that you characterize as being the Rosetta Stone in 12:23:03
25 your field? 12:23:05

1 A Well, you know, I -- well, let me -- let 12:23:06
2 me give you an example of another case that I 12:23:07
3 testified in last year in a similar fact situation 12:23:10
4 of this case where there's no product in the market 12:23:13
5 yet. There's regulatory approvals that need to be 12:23:16
6 done that weren't done yet; that there would be no 12:23:20
7 commercialization for years into the future. And I 12:23:21
8 had the business plans of the company that took the 12:23:24
9 trade secrets. 12:23:30

10 Now, there they provided me the model, and 12:23:31
11 they never made a calculation of what the impact 12:23:36
12 would be on them to accelerate the development by 12:23:39
13 any amount of time. I had to get into their model, 12:23:43
14 understand the logic, and make that calculation 12:23:46
15 myself. 12:23:47

16 In this case I have the same thing in that 12:23:49
17 I have projections done at the time of the alleged 12:23:51
18 theft by the party who was alleged to have taken the 12:23:55
19 trade secrets. 12:23:59

20 But they have even gone to the next step 12:24:01
21 of actually quantifying the impact of acceleration, 12:24:04
22 and so that's why I say it's the Rosetta Stone. 12:24:07
23 Normally I have to do more work than I did in this 12:24:09
24 case, but Uber has done it for me. 12:24:12

25 Q Right. And have you seen any similar 12:24:17

1 documents from my client, Otto Trucking? 12:24:20

2 A I knew that was next question. The answer 12:24:23

3 is no. And you're closing the loop. 12:24:25

4 MR. SCHUMAN: Why don't we take a 12:24:32

5 two-minute break. I don't think I have anything 12:24:33

6 more, but why don't we just -- 12:24:36

7 MR. BERRY: I actually have a couple of 12:24:36

8 questions. 12:24:38

9 MR. SCHUMAN: Well, I'm not sure I'm done 12:24:38

10 yet. I just want to -- 12:24:40

11 MR. BERRY: Okay. 12:24:41

12 MR. SCHUMAN: -- take a two-minute break 12:24:41

13 and make sure. And then if you have something else. 12:24:41

14 MR. BERRY: Okay. 12:24:44

15 MR. SCHUMAN: -- you guys can take that 12:24:45

16 up. 12:24:46

17 THE VIDEOGRAPHER: It's 12:24 p.m. We're 12:24:47

18 going off the record. 12:24:49

19 (A break was taken from 12:24 p.m. to 12:24:51

20 12:28 p.m.) 12:25:12

21 THE VIDEOGRAPHER: We are back on the 12:28:09

22 record. It's 12:28 p.m. 12:28:09

23 Q (BY MR. SCHUMAN) Mr. Wagner, did either 12:28:15

24 the Quinn firm or Waymo ask you or your firm to 12:28:17

25 prepare any damages opinions specific to my client, 12:28:22

1 Otto Trucking? 12:28:27

2 A I don't recall that specific instruction. 12:28:28

3 Q As you sit here today, do you plan to do 12:28:31

4 any work between now and the time of trial on 12:28:33

5 developing opinions regarding damages specific to my 12:28:38

6 client, Otto Trucking? 12:28:45

7 A No. 12:28:46

8 MR. SCHUMAN: Okay. I have no further 12:28:47

9 questions for you. Thank you for your time. 12:28:49

10 A Thank you. 12:28:52

11 MR. EISEMAN: Mr. Berry, what do you 12:28:56

12 consider this -- these questions? Do you consider 12:28:58

13 them to be redirect? 12:28:59

14 MR. BERRY: I haven't even thought about 12:29:02

15 how to characterize it. 12:29:03

16 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:29:08

17 BY MR. BERRY: 12:29:12

18 Q Mr. Wagner, I had a -- a couple of 12:29:12

19 questions. The first is: Your opinions in this 12:29:13

20 case assume that Uber is going to go to market and 12:29:15

21 commercialize its AV technology using the Fuji 12:29:19

22 LiDAR, right? 12:29:23

23 MR. EISEMAN: Objection as to form. 12:29:24

24 A I -- again, I -- I think that's assumed. 12:29:24

25 But again, that's a better question for 12:29:27

1 I, MARY J. GOFF, CSR No. 13427, Certified
2 Shorthand Reporter of the State of California,
3 certify;

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth, at
6 which time the witness declared under penalty of
7 perjury; that the testimony of the witness and all
8 objections made at the time of the examination were
9 recorded stenographically by me and were thereafter
10 transcribed under my direction and supervision; that
11 the foregoing is a full, true, and correct
12 transcript of my shorthand notes so taken and of the
13 testimony so given;

14 That before completion of the deposition,
15 review of the transcript () was (XX) was not
16 requested: () that the witness has failed or
17 refused to approve the transcript.

18 I further certify that I am not financially
19 interested in the action, and I am not a relative or
20 employee of any attorney of the parties, nor of any
21 of the parties.

22 I declare under penalty of perjury under the
23 laws of California that the foregoing is true and
24 correct, dated this 23rd day of September, 2017.

25 

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**UNREDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 Waymo LLC,

20 Plaintiff,

21 v.

22 Uber Technologies, Inc.; Ottomotto LLC; Otto
Trucking LLC,

23 Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANT OTTO TRUCKING LLC'S
OPPOSITION TO PLAINTIFF WAYMO
LLC'S MOTION TO EXCLUDE OTTO
TRUCKING'S DAMAGES EXPERT
JAMES MALACKOWSKI PURSUANT TO
RULE 702 AND DAUBERT**

Date: September 27, 2017
Time: 8:00 a.m.
Courtroom: 8 (19th Floor)
Judge: Hon. William Alsup
Trial: October 10, 2017

Filed/Lodged Concurrently with:
1. Declaration of Neel Chatterjee

I. INTRODUCTION

Otto Trucking respectfully requests that the Court deny Waymo's motion to exclude Otto Trucking's damages expert, James Malackowski. Mr. Malackowski is a preeminent licensing and damages expert with 30 years of experience. Waymo does not challenge Mr. Malackowski's qualifications. Nor does Waymo even attempt to discuss the record evidence and reasoning that support Mr. Malackowski's damages opinions. Instead, Waymo asks the Court to exclude Mr. Malackowski's damages opinions related to Otto Trucking based solely on the ground that his opinions are allegedly improper legal conclusions.¹ Waymo is incorrect.

In this litigation — indeed, in its current motion — Waymo has openly admitted that it has no specific damages theory as related to Otto Trucking. *See* Waymo's Motion to Exclude Otto Trucking's Damages Expert James Malackowski Pursuant to Rule 702 and *Daubert* ("Mot."), at 4. Consistent with this admission, Waymo's expert, Michael Wagner, sets forth damages opinions for unjust enrichment and reasonable royalty based only on facts relating to Uber and Ottomotto — not Otto Trucking. For Otto Trucking, Mr. Wagner readily admits he cannot quantify any damages, royalties or unjust enrichment. In his deposition, Mr. Wagner went so far as to say he has not even investigated whether any compensation is due. In response to Mr. Wagner's report, Mr. Malackowski explains that (1) there should be no separate damages against Otto Trucking for any alleged misappropriation and, relatedly, (2) Mr. Wagner has failed to address any separate recovery from Otto Trucking. These are not legal conclusions, and there really should be no dispute that Mr. Malackowski is permitted to analyze and criticize the methodology of Waymo's experts.

Despite no evidence of any calculation by Mr. Wagner, Waymo nevertheless takes issue with Mr. Malackowski's opinions because he does not address its purported damages theories based on joint and several liability and vicarious liability. *See id.* Oddly enough, these liability issues are legal issues that Mr. Malackowski properly did not address (and that have already been presented to the Court, *see* Dkt. No. 1423 at 19-20; Dkt. No. 1637 at 8-14) (briefing on Otto Trucking's summary

¹ Mr. Malackowski's report contains additional opinions relating to (a) the unreliability of Mr. Wagner's unjust enrichment opinions, (b) Mr. Wagner's failure to demonstrate that a permanent injunction is appropriate, and (c) the unreliability of the opinions of Waymo's other expert, Jim Timmins. Waymo has not sought to exclude any of these opinions.

judgment motion)). Indeed, Waymo's own expert Mr. Wagner does not discuss joint and several liability or vicarious liability in his report. It thus appears that Waymo, through this motion, is improperly attempting to have these legal liability issues adjudged in its favor. But it is well-settled that a *Daubert* motion cannot be used in this fashion. *See, e.g., Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525 PSG (PJWx), 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010) ("[M]otions *in limine* should not be used as disguised motions for summary judgment.").

In short, Mr. Malackowski's opinions are both based on the specific facts of this case and responsive to Mr. Wagner's report. These opinions are within the purview of Rule 702 and should be heard by a jury in open court. Waymo's motion should be denied.

II. MR. MALACKOWSKI'S OPINIONS

Mr. Malackowski sets forth two opinions in his expert report related to damages as to Otto Trucking: (1) there should be no separate damages recovery from Otto Trucking, *see* Declaration of Neel Chatterjee ("Chatterjee Decl."), Ex. 1 ("Malackowski Rept.") at 41-43; and (2) Waymo's expert, Mr. Wagner, fails to separately address monetary recovery from Otto Trucking, *see id.* at 43-50.

First, Mr. Malackowski opines that there should be no separate recovery against Otto Trucking. He explains that, under the facts of this case, any recovery against Uber or Ottomotto will resolve Waymo's claims such that Waymo will be fully compensated for any alleged misappropriation. In particular, Mr. Malackowski discusses three possible factual scenarios in the case:

Regardless of the outcome of this litigation, it will satisfy Waymo's claim against Otto Trucking. First, should Waymo prevail on the merits of this case and be granted an injunction, Uber will be precluded from utilizing the subject matter of the asserted trade secrets, and the AV-related technology licensed from Uber to Otto Trucking would consequently exclude the asserted trade secrets.

Second, if Waymo prevails on the merits of this case but is denied an injunction, the monetary recovery Waymo receives from Uber would satisfy Waymo with respect to all uses Uber makes of the alleged trade secrets, including those of its non-exclusive licensee, Otto Trucking. As set forth above, there is no record evidence that Otto Trucking has or will achieve any cost savings of its own relating to the alleged use of the asserted trade secrets.

Third, if Waymo loses on the merits of this case, then the fact finder would have concluded that neither Uber or Otto Trucking misappropriated the alleged trade secrets, and no recovery will be due Waymo from Uber or Otto Trucking.

Id. at 43.

Second, Mr. Malackowski details how Mr. Wagner failed to address separate monetary recovery from Otto Trucking. Mr. Malackowski first directs attention to Mr. Wagner's assertion that there are certain measures of damages for Otto Trucking that he could not quantify:

The Wagner Report fails to address monetary recovery from Otto Trucking. According to Mr. Wagner:

"other benefits to Defendants that I cannot quantify at this time include:

- The unjust enrichment to Otto Trucking based on the potential consideration to be paid if Uber exercises its option to acquire Otto Trucking.
- The unjust enrichment to Otto Trucking or Uber based on employing LiDAR systems with reduced expenses in the future..."

Id. at 43 (quoting Wagner Rept. at 121). Mr. Malackowski further explains that, in addition to these excluded calculations, Mr. Wagner's unjust enrichment and reasonable royalty calculations do not take into account any facts related to Otto Trucking. *See id.* at 43 ("Wagner also failed to address Otto Trucking in either of his alternative measures of unjust enrichment."), 44 ("Mr. Wagner likewise fails to address Otto Trucking in his reasonable royalty analysis[.]"). As Mr. Malackowski points out, "[t]he introduction to Mr. Wagner's unjust enrichment analysis in fact confirms that his analyses do not relate to Otto Trucking":

"I discuss and quantify unjust enrichment *to Uber* measured in two alternative ways: measured by accelerated AV development and measured by saved development expenses. I also discuss unjust enrichment *to Ottomotto* measured by the acquisition by Uber. I also discuss other ways in which the Defendants have been unjustly enriched that I'm unable to quantify at this time."

Id. at 43-44 (quoting Wagner Rept. at 103-104; emphasis in Malackowski Rept.).

Mr. Wagner has since confirmed at deposition that he did no separate work or analysis as to Otto Trucking. *See* Chatterjee Decl., Ex. 2 (Wagner Rough Dep. Tr.) at 123:25-124:4 ("Q. Okay. You're not offering any opinions in this case as to any damages caused to Waymo specific to [] Otto Trucking; is that right? A. That's correct."), 135:7-11 ("Q. Approximately what percentage of your

64 hours, Mr. Wagner, did you spend focusing on calculating damages specific to my client, Otto Trucking? A. Zero.”), 131:7-11 (“Q. You didn’t do any separate calculation of the amount that Otto Trucking would have agreed to pay Waymo at a hypothetical negotiation set during that same time period, correct? A. That is accurate.”).

III. ARGUMENT

Mr. Malackowski’s expert opinions are based upon his extensive prior experience, tied directly to facts of the case, and directly responsive to Mr. Wagner’s damages opinions. Moreover, Mr. Malackowski’s responsive opinions are precisely the types of opinions contemplated by the Federal Rules. *See, e.g., Nehara v. California*, No. 1:10-CV-00491 JLT, 2013 WL 5670867, at *2 (E.D. Cal. Oct. 16, 2013) (“A party may file a ‘rebuttal’ expert report to ‘contradict or rebut evidence’ offered by another party in its initial expert disclosures.”) (citing Fed. R. Civ. P. 26(a)(2)(D)(ii)). Mr. Malackowski should be permitted to testify before the jury as to these opinions, as such testimony will assist the jury in understanding Mr. Wagner’s opinions as well as the evidence (or lack thereof) that Waymo sets forth to support its damages against Otto Trucking. *See* Fed. R. Evid. 702.

Setting aside its broad complaints of improper legal conclusions, Waymo fails to provide any specific analysis as to how Mr. Malackowski’s opinions constitute legal conclusions. Waymo’s single cited case, *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051 (9th Cir. 2008), highlights the deficiencies in its “legal conclusion” argument. In that case, the expert’s excluded testimony all related to improper recitations and applications of the law. The district court excluded the following legal explanations and conclusions :

(1) sections that discuss the UCC and/or apply the UCC to the facts of this case; (2) sections that discuss non-UCC law and/or apply non-UCC law to the facts of this case; (3) sections that discuss agency law and/or apply agency law to the facts of this case; (4) sections that discuss the parties’ legal rights, duties, and obligations under the law; (5) sections that label the parties’ actions as “wrongful” or “intentional” under the law; and (6) sections that discuss the appropriate formula to calculate damages under the law.

Id. at 1058. Here, in contrast, Mr. Malackowski does not recite or explain any laws in his expert report, nor does he attempt to apply any laws. And Waymo certainly has not identified any such

1 laws in its motion. To the contrary, as discussed above, Mr. Malackowski's report is limited to
 2 interpretation of the facts of this case and the theories presented in the Wagner report.

3 Waymo's arguments related to joint and several liability and vicarious liability can be
 4 summarily dismissed. *See* Mot. at 4-5. Those legal issues are not discussed by either parties'
 5 damages expert and are entirely unrelated to Mr. Malackowski's qualifications or the soundness of
 6 his methodology under Rule 702 or *Daubert*. Waymo can litigate the merits of its liability theories
 7 outside the context of a *Daubert* motion.

8 **IV. CONCLUSION**

9 For the reasons set forth above, Waymo's motion to exclude Mr. Malackowski should be
 10 denied.

11 Dated: September 22, 2017

Respectfully submitted,

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19 *Attorneys for Defendant: Otto Trucking LLC*
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 21
 22
 23
 24
 25
 26
 27
 28

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document including all of its attachments with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **September 22, 2017**. I further certify that all participants in the case are registered CM/ECF users and that service of the publicly filed documents will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **September 22, 2017**.

/s/ Neel Chatterjee
NEEL CHATTERJEE

EXHIBIT 2

***UNREDACTED VERSION
OF DOCUMENT
SOUGHT TO BE SEALED***

EXHIBIT 2

2714429AMG.txt

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

2

09:34:28 3 THE VIDEOGRAPHER: Good morning. We are
09:34:29 4 going on the record at 9:34, on September 22 of the
09:34:35 5 Year 2017. Please understand microphones are very
09:34:42 6 sensitive, and they may pick up whispering ad
09:34:44 7 private conversations and cellular interference.

09:34:49 8 Please turn off your cell phones or place
09:34:51 9 them away from the microphones, as they may
09:34:54 10 interfere with the audio. Audio and video recording
09:34:57 11 will continue to take place unless all parties agree
09:35:01 12 to go off of the record.

09:35:03 13 This is Disc 1, Volume I in the video
09:35:06 14 deposition of Michael J. Wagner, taken by counsel
09:35:10 15 for Defendants in the matter of Waymo LLC v. Uber
09:35:16 16 Technologies. It's filed in the United States
09:35:19 17 District Court, for the Northern District of
09:35:21 18 California, Case No. 17-cv-00939-WHA.

09:35:29 19 This is being taken at Morrison &
09:35:31 20 Foerster. They're at 425 Market Street in
09:35:35 21 San Francisco. My name is Kevin Foor, and I am here
09:35:40 22 with Mary Goff-Sharma, and we are from Veri text.
09:35:45 23 I'm not related to any party nor am I financially
09:35:49 24 interested in the outcome in any way.

09:35:52 25 Counsel and -- and all present in the

1

2714429AMG.txt

12:08:16 23 Otto Trucking LLC. Do you know who Otto Trucking
12:08:18 24 is?
12:08:19 25 A I do.

123

1 ROUGH ASCII--NOT FINAL CERTIFIED TRANSCRIPT

12:08:20 2 Q Who is Otto what's your understanding of
12:08:22 3 what Otto Trucking is?
12:08:23 4 A Well, I -- I believe it's a company that's
12:08:25 5 owned by -- principally owned by Mr. Levandowski and
12:08:32 6 Lior.
12:08:34 7 And it is in -- has signed an -- an

12:08:37 8 acquisition of purchase agreement with Uber where it
12:08:43 9 it's Uber's discretion to purchase that company
12:08:46 10 between now and sometime in November. And it is a

12:08:49 11 company that is focused on applying LiDAR technology
12:08:53 12 to trucks.

12:08:56 13 Q Do you know whether Otto Trucking has any
12:08:58 14 employees?

12:08:59 15 A Well, my understanding is they do not at
12:09:01 16 least from the last facts that I have.

12:09:04 17 Q Do you have any understanding of as to
12:09:04 18 whether Otto Trucking does any research and
12:09:07 19 development activities?

12:09:12 20 A I -- I I don't know whether they do or not
12:09:16 21 I understand that Uber is advancing development
12:09:18 22 funds to them. So I -- I would think they do. But

12:09:22 23 whether that's done with actually being done by Uber
12:09:26 24 and not your client, I don't know.

2714429AMG.txt

12: 09: 29 25 Q Okay. You're not offering any opinions in

124

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

12: 09: 31 2 this case as to any damages caused to Waymo specific

12: 09: 36 3 to oath Otto Trucking; is that right?

12: 09: 38 4 A That's correct.

12: 09: 38 5 Q Okay. And so then your damages -- I'm

12: 09: 44 6 going to walk through briefly -- not in the level of

12: 09: 46 7 detail that Uber's counsel did -- but I just want to

12: 09: 48 8 walk through your principal opinions in this case.

12: 09: 50 9 You have offered two unjust enrichment

12: 09: 55 10 unjust enrichment calculations and a reasonable

12: 09: 58 11 royalty measure, correct?

12: 10: 00 12 A That's fair.

12: 10: 01 13 Q Okay. The first unjust enrichment measure

12: 10: 05 14 values the accelerated development to -- that Uber

12: 10: 10 15 was able to achieve through the alleged

12: 10: 13 16 misappropriation of these nine trade secrets, right?

12: 10: 16 17 A Yes.

12: 10: 17 18 Q And -- and your opinion -- that -- we'll

12: 10: 20 19 call that your first unjust enrichment opinion.

12: 10: 24 20 That opinion is based upon internal Uber

12: 10: 28 21 documents showing some accelerated development,

12: 10: 31 22 correct?

12: 10: 32 23 A That's fair.

12: 10: 34 24 Q That opinion is not based upon any Otto

12: 10: 36 25 Trucking documents; is that right?

2714429AMG.txt

12:16:07 8 that word -- the caveats you're referring to
 12:16:09 9 regarding the applicability of your unjust
 12:16:12 10 enrichment damage theories, those caveats are Uber
 12:16:17 11 acquires Otto Trucking and that Uber shares some of
 12:16:21 12 the technology it's developing using the allegedly
 12:16:25 13 misappropriated trade secrets with Otto Trucking; is
 12:16:28 14 that right?
 12:16:28 15 A That's -- that's -- again, that's my
 12:16:30 16 conclusion -- or that would be my opinion as a
 12:16:33 17 damages expert.
 12:16:33 18 Q If both of those assumptions are true,
 12:16:36 19 then your damages opinions -- your unjust enrichment
 12:16:39 20 damages opinions may have some applicability to Otto
 12:16:41 21 Trucking, correct?
 12:16:44 22 MR. EISEMAN: Objection as to form.
 12:16:44 23 A That's fair.
 12:16:49 24 Q (BY MR. BERRY) You also have a reasonable
 12:16:53 25 royalty rate calculation. And that measures the

131

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT
 12:16:55 2 amount that Uber would have agreed to pay Waymo in
 12:16:58 3 this hypothetical negotiation set in the --
 12:17:01 4 somewhere in the December 15 -- August -- between
 12:17:05 5 December '15 and August 2016 time period, right?
 12:17:09 6 A Correct?
 12:17:09 7 Q You didn't do any separate calculation of
 12:17:11 8 the amount that Otto Trucking would have agreed to
 12:17:15 9 pay Waymo at a hypothetical negotiation set during

2714429AMG.txt

12:17:20 10 that same time period, correct?

12:17:22 11 A That is accurate.

12:17:23 12 Q Okay. And then for the reasonable royalty
12:17:25 13 calculation that you did, you start with a baseline
12:17:28 14 of Uber's unjust enrichment. And then you adjusted
12:17:32 15 upward based on some analysis you have done of
12:17:36 16 certain of the Georgia-Pacific factors. Namely 4,
12:17:38 17 5, 6, 8, and 11, correct?

12:17:42 18 A Those are the only ones that had any
12:17:45 19 impact on changing the number from the baseline.
12:17:47 20 That is correct.

12:17:48 21 Q And -- and Factor 5 -- this is addressed
12:17:52 22 in your report at paragraphs 399 to 401 -- that --
12:17:55 23 that factor deals with the commercial relationship
12:17:58 24 between Waymo and Uber and some documents that you
12:18:02 25 referred regarding the -- the potential competitive

132

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT

12:18:08 2 relationship between those two companies, right?

12:18:10 3 A Yes.

12:18:11 4 Q That analysis in Factor 5 is -- is
12:18:13 5 inapplicable to -- to my client Otto Trucking --

12:18:16 6 A Yeah --

12:18:16 7 Q -- right?

12:18:16 8 A -- as discussed in my report, that is
12:18:19 9 correct.

12:18:20 10 Q Right. And -- and Factor 8 deals with
12:18:25 11 expected future profitability. And you analyzed

2714429AMG.txt

12: 20: 30 16 Q So as we sit here today based on the work
12: 20: 33 17 you have done so far up to and including today, you
12: 20: 36 18 don't have an opinion of what damages Waymo would be
12: 20: 39 19 entitled to under that hypothetical verdict --
12: 20: 41 20 MR. EISEMAN: Objection.
12: 20: 41 21 Q -- is that fair (talking over each other
12: 20: 42 22 -- check *)?
12: 20: 43 23 MR. EISEMAN: Objection as to form.
12: 20: 43 24 A I do not.
12: 20: 44 25 Q (BY MR. SCHUMAN) In -- in response to some

135

1 ROUGH ASCII --NOT FINAL CERTIFIED TRANSCRIPT
12: 20: 50 2 of the questions you got from Uber's counsel, you --
12: 20: 55 3 you mentioned that you personally spent
12: 20: 58 4 approximately 64 hours total working on -- working
12: 21: 01 5 on your opinions in this case. Obviously, your
12: 21: 04 6 staff spent many more hours than that.

12: 21: 06 7 Approximately what percentage of your
12: 21: 09 8 64 hours, Mr. Wagner, did you spend focusing on
12: 21: 14 9 calculating damages specific to my client, Otto
12: 21: 16 10 Trucking?

12: 21: 17 11 A Zero.

12: 21: 25 12 Q Just bear with me a second.

12: 21: 27 13 A But I could approximate -- it's exactly
12: 21: 31 14 64.0 hours through September 15. And it's been 13.4
12: 21: 39 15 hours since then before today

12: 21: 39 16 Q I would --

12: 21: 40 17 A -- between September 15 and today (talking
Page 127

UNREDACTED
VERSION OF EXHIBIT 1
SOUGHT TO BE FILED
UNDER SEAL IN ITS
ENTIRETY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
vs.) Case No.
UBER TECHNOLOGIES, INC.;) 17-cv-00939-WHA
OTTOMOTTO, LLC; OTTO TRUCKING LLC,)
Defendants.)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF MICHAEL J. WAGNER
San Francisco, California
Friday, September 22, 2017
Volume I

Reported by:
MARY J. GOFF
CSR No. 13427
Job No. 2714429

PAGES 1-145

Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
vs.) Case No.
UBER TECHNOLOGIES, INC.;) 17-cv-00939-WHA
OTTOMOTTO, LLC; OTTO TRUCKING LLC,)
Defendants.)
_____)

HIGHLY CONFIDENTIAL

Videotaped Deposition of MICHAEL J. WAGNER,
Volume I, taken on behalf of Defendants,
at Morrison & Foerster, 425 market Street,
33rd Floor, San Francisco, beginning at
9:34 a.m. and ending at 12:30 p.m., on
September 22, 2017, before MARY GOFF, Certified
Shorthand Reporter No. 13427.

1 A Yeah, but I -- he thinks -- he thinks my 12:07:51
2 profile is not as good as my straight face. 12:07:53
3 THE VIDEOGRAPHER: What he said. Do you 12:07:57
4 want to stay on or -- we can stay on. 12:07:59
5 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:08:03
6 BY MR. SCHUMAN: 12:08:04
7 Q All right. Good afternoon, Mr. Wagner. 12:08:07
8 A Good afternoon, Mr. Schuman. 12:08:10
9 Q Mr. Wagner, I represent a company called 12:08:14
10 Otto Trucking LLC. Do you know who Otto Trucking 12:08:16
11 is? 12:08:18
12 A I do. 12:08:19
13 Q Who is Otto -- what's your understanding 12:08:20
14 of who Otto Trucking is? 12:08:21
15 A Well, I -- I believe it's a company that's 12:08:23
16 owned by -- principally owned by Mr. Levandowski and 12:08:25
17 Lior. 12:08:32
18 And it is in -- has signed an -- an 12:08:34
19 acquisition of purchase agreement with Uber where 12:08:37
20 it -- it's Uber's discretion to purchase that 12:08:42
21 company between now and sometime in November. And 12:08:45
22 it is a company that is focused on applying LiDAR 12:08:48
23 technology to trucks. 12:08:52
24 Q Do you know whether Otto Trucking has any 12:08:56
25 employees? 12:08:58

1 A Well, my understanding is they do not, at 12:08:59

2 least from the last facts that I have. 12:09:01

3	Q Do you have any understanding as to	12:09:04
4	whether Otto Trucking does any research and	12:09:04
5	development activities?	12:09:07

6 A I -- I -- I don't know whether they do or 12:09:12

7 not. I understand that Uber is advancing 12:09:15

8 development funds to them, so I -- I would think 12:09:18

[illegible]

12	Q	Okay. You're not offering any opinions in	12:09:29
13		this case as to any damages caused to Waymo specific	12:09:31
14		to Otto Trucking; is that right?	12:09:36

15	A	That's correct.	12:09:38
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16	Q Okay. And so then your damages -- I'm	12:09:38
17	going to walk through briefly -- not in the level of	12:09:44
18	detail that Uber's counsel did, but I just want to	12:09:46
19	walk through your -- your principal opinions in this	12:09:48
20	case.	12:09:50

21	You have offered two unjust enrichment	12:09:50
22	calculations and a -- and a reasonable royalty	12:09:55
23	measure, correct?	12:09:59

24	A	That's fair.	12:10:00
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25	Q	Okay. The first unjust enrichment measure	12:10:01
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1 values the accelerated development to -- that Uber 12:10:05
2 was able to achieve through the alleged 12:10:10
3 misappropriation of these nine trade secrets, right? 12:10:13
4 A Yes. 12:10:16
5 Q And -- and your opinion -- that -- we'll 12:10:17
6 call that your first unjust enrichment opinion. 12:10:20
7 That opinion is based on internal Uber 12:10:24
8 documents showing some accelerated development, 12:10:28
9 correct? 12:10:31
10 A That's fair. 12:10:32
11 Q That opinion is not based on any Otto 12:10:34
12 Trucking documents; is that right? 12:10:36
13 A It is not. 12:10:40
14 Q So would you agree with me then that your 12:10:42
15 first unjust -- unjust enrichment theory is not 12:10:45
16 applicable to Otto Trucking? 12:10:48
17 MR. EISEMAN: Objection as to form. 12:10:50
18 A You know, I -- what I would say is that 12:10:51
19 unless Uber exercises its option to purchase Otto 12:10:56
20 Trucking or shares this accelerated depreciation -- 12:11:01
21 or accelerated development with Otto Trucking, then 12:11:04
22 my calculations have nothing to do with your client. 12:11:10
23 Q (BY MR. SCHUMAN) Right. And as we sit 12:11:15
24 here today, you know that Uber has not exercised the 12:11:15
25 option to the purchase Otto Trucking, right? 12:11:18

1 A I -- I don't know that. But those facts 12:11:21
2 have not been brought to my attention. And if it 12:11:23
3 had happened, I fully expect I would be aware of it. 12:11:26
4 Q Right. And the accelerated -- sharing the 12:11:30
5 accelerated development with Otto Trucking, what did 12:11:33
6 you mean by that? 12:11:36
7 A Well, if -- if -- if as a result of Uber 12:11:36
8 accelerating development of LiDAR on their veh -- on 12:11:43
9 their vehicles for their transportation as a 12:11:46
10 service, they -- they're also -- then by Otto 12:11:48
11 Trucking -- and Otto Trucking is going to get into 12:11:51
12 the market one or two years earlier than they 12:11:54
13 otherwise would -- then I think it might be 12:11:58
14 appropriate to your client. But unless those facts 12:12:00
15 occur, what I have calculated has nothing to do with 12:12:03
16 your client. 12:12:05
17 Q All right. And as we sit here today, you 12:12:06
18 do know that those facts that you have just in your 12:12:07
19 last answer summarized have not occurred yet, right? 12:12:10
20 A That's correct. 12:12:13
21 Q Your second unjust enrichment calculation 12:12:14
22 is based on the cost that -- that you have opined 12:12:16
23 Uber saved in its development of autonomous vehicles 12:12:20
24 through alleged use of these nine trade secrets, 12:12:25
25 right? 12:12:29

1 A Yes. 12:12:29

2 Q And again, that's based on Uber documents 12:12:29

3 showing a \$20 million per-month run rate for its R&D 12:12:33

4 program on autonomous vehicles, right? 12:12:39

5 A Yeah, documents and I believe deposition 12:12:42

6 testimony of Mr. Bares. 12:12:44

7 Q Fair. Right. And -- and so your second 12:12:45

8 unjust enrichment calculation is not based on any 12:12:48

9 Otto Trucking-specific evidence; is that fair? 12:12:50

10 A That is fair. 12:12:55

11 Q So your second unjust enrichment 12:12:55

12 calculation, would you agree with me, is not 12:12:57

13 applicable to Otto Trucking? 12:13:00

14 MR. EISEMAN: Objection as to form. 12:13:02

15 A Yes, with the same caveats as I discussed 12:13:02

16 on the first calculation. 12:13:05

17 Q (BY MR. SCHUMAN) Right. So assume -- 12:13:07

18 assume for purposes of this question that Otto 12:13:08

19 Trucking pays Uber some amount of money for the work 12:13:11

20 that Uber employees are -- are doing on 12:13:18

21 autonomous -- the development of autonomous trucks. 12:13:22

22 Have you seen any evidence in the 12:13:25

23 materials you reviewed as to what Otto Trucking's 12:13:28

24 burn rate is for that development? 12:13:32

25 A No. 12:13:35

1 Q Okay. Did -- on the list of materials you 12:13:36
2 reviewed or at least considered is the Brent Schwarz 12:13:39
3 deposition. 12:13:44
4 Do you recall reviewing any portions of 12:13:45
5 Mr. Schwarz's deposition? 12:13:47
6 A I personally do not. 12:13:48
7 Q You have a separate section of your 12:13:55
8 report -- and we were just covering this with Uber's 12:13:58
9 counsel -- unjust enrichment related to Trade Secret 12:14:02
10 No. 90. And I think you have an \$8 million unjust 12:14:04
11 enrichment figure for that; is -- 12:14:08
12 A Yes -- 12:14:10
13 Q -- that right? 12:14:10
14 A -- that's correct. 12:14:11
15 Q And that is -- that -- is that based on 12:14:12
16 any Otto Trucking documents or evidence? 12:14:15
17 A No. 12:14:17
18 Q Does that theory have any applicability to 12:14:18
19 Otto Trucking? 12:14:20
20 MR. EISEMAN: Objection as to form. 12:14:21
21 A You know, I -- no, again, with the same 12:14:22
22 caveats. And -- and I personally believe that my 12:14:26
23 work is only relevant unless client is -- you will 12:14:28
24 have no role at the trial, because your client will 12:14:32
25 be owned by Uber. And I assume Uber's counsel will 12:14:35

1 be representing their interests at that point. But 12:14:38
2 I -- that's only way I see my work as relevant to 12:14:41
3 your client. 12:14:44
4 Q (BY MR. SCHUMAN) Right. So the same 12:14:49
5 caveat -- the same caveats that you're referring to 12:14:49
6 in that answer are -- are the sort of -- we'll call 12:14:51
7 them speculative future possibility that Uber 12:14:54
8 acquires Otto Trucking and shares some of these 12:14:58
9 benefits that you have quantified with Otto Trucking 12:15:01
10 in the future; is -- 12:15:04
11 MR. EISEMAN: Objection. 12:15:05
12 Q (BY MR. SCHUMAN) -- that -- 12:15:05
13 MR. EISEMAN: Objection. Sorry. 12:15:06
14 Q (BY MR. SCHUMAN) Am I -- 12:15:07
15 MR. EISEMAN: Objection as to form. 12:15:09
16 Q (BY MR. SCHUMAN) I didn't ask the question 12:15:09
17 yet. Do you understand that -- do I understand your 12:15:10
18 caveats correctly? 12:15:14
19 MR. EISEMAN: Objection as to form. 12:15:15
20 A Yes. If you took just the 12:15:16
21 word "speculative" out of your question, I would 12:15:18
22 agree with what you said. 12:15:21
23 I mean -- yeah, I don't know whether 12:15:24
24 they're going to get acquired or not. But you know, 12:15:25
25 clearly your -- your client is -- is getting a lot 12:15:27

1 of funds from Uber. Uber is forwarding -- committed 12:15:29
2 to forward a lot of funds to your client. There -- 12:15:32
3 there is a -- a deal done that your client -- client 12:15:34
4 will have to accept and Uber can force on your 12:15:38
5 client, if they want to. 12:15:41
6 I don't know what their mind-set is right 12:15:43
7 now, and I don't know how much development on the 12:15:45
8 truck has been done as to whether Uber believes it's 12:15:47
9 appropriate to purchase your client. 12:15:51
10 So I don't think it's wild speculation, 12:15:54
11 but I clearly do not know whether it will happen or 12:15:56
12 not. But then all the caveats apply. 12:16:00
13 Q (BY MR. SCHUMAN) Right. So fair enough. 12:16:03
14 Taking out the word "speculative." I know we don't 12:16:03
15 like using that word. The caveats you're referring 12:16:06
16 to regarding the applicability of your unjust 12:16:09
17 enrichment damage theories, those caveats are Uber 12:16:12
18 acquires Otto Trucking and that Uber shares some of 12:16:17
19 the technology it's developing using the allegedly 12:16:21
20 misappropriated trade secrets with Otto Trucking; is 12:16:25
21 that right? 12:16:28
22 A That's -- that's -- again, that's my 12:16:28
23 conclusion -- or that would be my opinion as a 12:16:30
24 damage expert. 12:16:33
25 Q If both of those assumptions are true, 12:16:33

1 then your damages opinions -- your unjust enrichment 12:16:36

2 damages opinions may have some applicability to Otto 12:16:39

3 Trucking, correct? 12:16:41

4 MR. EISEMAN: Objection as to form. 12:16:44

5 A That's fair. 12:16:44

6 Q (BY MR. SCHUMAN) You also have a 12:16:49

7 reasonable royalty rate calculation, and that 12:16:52

8 measures the amount that Uber would have agreed to 12:16:55

9 pay Waymo in this hypothetical negotiation set in 12:16:57

10 the -- somewhere in the December 15 -- August -- 12:17:01

11 between December '15 and August 2016 time period, 12:17:04

12 right? 12:17:08

13 A Correct. 12:17:09

14 Q You didn't do any separate calculation of 12:17:09

15 the amount that Otto Trucking would have agreed to 12:17:11

16 pay Waymo at a hypothetical negotiation set during 12:17:15

17 that same time period, correct? 12:17:20

18 A That is accurate. 12:17:22

19 Q Okay. And then for the reasonable royalty 12:17:23

20 calculation that you did, you start with a baseline 12:17:25

21 of Uber's unjust enrichment. And then you adjusted 12:17:28

22 upward based on some analysis you have done of 12:17:32

23 certain of the Georgia-Pacific factors. Namely 4, 12:17:36

24 5, 6, 8, and 11, correct? 12:17:38

25 A Those are the only ones that had any 12:17:42

1 impact on changing the number from the baseline. 12:17:45

2 That is correct. 12:17:47

3 Q And -- and Factor 5 -- this is addressed 12:17:48

4 in your report at paragraphs 399 to 401 -- that -- 12:17:52

5 that factor deals with the commercial relationship 12:17:55

6 between Waymo and Uber and some documents that you 12:17:58

7 referred regarding the -- the potential competitive 12:18:02

8 relationship between those two companies, right? 12:18:08

9 A Yes. 12:18:10

10 Q That analysis in Factor 5 is -- is 12:18:11

11 inapplicable to -- to my client Otto Trucking -- 12:18:13

12 A Yeah -- 12:18:16

13 Q -- correct? 12:18:16

14 A -- as discussed in my report, that is 12:18:16

15 correct. 12:18:19

16 Q Right. And -- and Factor 8 deals with 12:18:20

17 expected future profitability. And you analyzed 12:18:25

18 Waymo's and Uber's projections for profitability of 12:18:29

19 autonomous vehicles. 12:18:36

20 And in your view, that factor counseled in 12:18:36

21 favor of some enhancement to the baseline for the 12:18:38

22 reasonable royalty calculation, right? 12:18:42

23 A That's fair. 12:18:44

24 Q Okay. And -- and you were working with 12:18:45

25 Waymo and Uber projections there, not any 12:18:48

1 projections from Otto Trucking, right? 12:18:51

2 A Correct. I don't believe I have seen any 12:18:52

3 projections for your client -- 12:18:54

4 Q Right. 12:18:56

5 A -- and so I poss -- I could not have 12:18:56

6 possibly considered them. 12:18:58

7 Q Okay. You answered my next question, so 12:18:59

8 that'll make us go a little faster. 12:19:01

9 Factor 11 talks about the extent of the 12:19:04

10 use of the invention. This is addressed at 12:19:06

11 paragraphs 424 and 428 of your report. And again, 12:19:09

12 you find that that factor pushes the base -- the -- 12:19:12

13 the reasonable royalty baseline up a little bit 12:19:13

14 because of your assumptions based on the work of 12:19:17

15 others that -- that Uber has used these trade 12:19:21

16 secrets, right? 12:19:24

17 A Yes. 12:19:25

18 Q And you -- you have not done or are -- at 12:19:28

19 least -- have -- have you seen any evidence of any 12:19:30

20 use of any of these trade secrets by my client, Otto 12:19:33

21 Trucking? 12:19:36

22 MR. EISEMAN: Objection as to form. 12:19:37

23 A I have not. 12:19:37

24 Q (BY MR. SCHUMAN) And so your analysis of 12:19:41

25 Factor 11 is inapplicable to my client, Otto 12:19:42

Page 136

1 Trucking, right? 12:19:46

2 MR. EISEMAN: Objection as to form. 12:19:47

3 A Based on the information that I have at 12:19:48

4 this time, that is correct. 12:19:50

5 Q (BY MR. SCHUMAN) Okay. Mr. Wagner, if the 12:19:53

6 jury finds that -- and this is the hypothetical, so 12:19:55

7 it's -- follow me here. If the jury finds that Uber 12:19:57

8 and Ottomotto -- strike that. I'm going to start 12:20:01

9 over. 12:20:05

10 Hypothetical: If at trial in this case 12:20:05

11 the jury finds in favor of Uber -- Uber and 12:20:06

12 Ottomotto -- so a defense verdict for them -- but 12:20:10

13 against Otto Trucking on liability, what's your 12:20:13

14 opinion as to the damages that Waymo would be 12:20:17

15 entitled to as to my client, Otto Trucking? 12:20:20

16 MR. EISEMAN: Objection as to form. 12:20:23

17 A I would need more facts to know if there's 12:20:24

18 any relevance of what I have done would apply to 12:20:25

19 your client in that hypothetical. 12:20:28

20 Q (BY MR. SCHUMAN) So as you sit here today 12:20:30

21 based on the work you have done so far up to and 12:20:32

22 including today, you don't have an opinion of what 12:20:35

23 damages Waymo would be entitled to under that 12:20:38

24 hypothetical verdict -- 12:20:40

25 MR. EISEMAN: Objection. 12:20:41

Page 137

1 Q (BY MR. SCHUMAN) -- is that fair? 12:20:41

2 MR. EISEMAN: Objection as to form. 12:20:43

3 A I do not. 12:20:43

4 Q (BY MR. SCHUMAN) In -- in response to some 12:20:44

5 of the questions you got from Uber's counsel, you -- 12:20:50

6 you mentioned that you personally spent 12:20:55

7 approximately 64 hours total working on -- working 12:20:58

8 on your opinions in this case. Obviously, your 12:21:01

9 staff spent many more hours than that. 12:21:04

10 Approximately what percentage of your 12:21:06

11 64 hours, Mr. Wagner, did you spend focusing on 12:21:09

12 calculating damages specific to my client, Otto 12:21:14

13 Trucking? 12:21:16

14 A Zero. 12:21:17

15 Q Just bear with me a second. 12:21:25

16 A But I could -- the approximate -- it's 12:21:27

17 exactly 64.0 hours through September 15. And it's 12:21:30

18 been 13.4 hours since then before today. 12:21:36

19 Q I would -- 12:21:39

20 A -- between September 15 and today. 12:21:40

21 Q In response to some questions from Uber's 12:21:44

22 counsel, I think you made clear that your damages 12:21:45

23 are based on Uber's use of -- alleged use of the 12:21:46

24 trade secrets in its development of its autonomous 12:21:53

25 vehicles. 12:21:56

1 If the evidence at trial shows that my 12:22:01
2 client, Otto Trucking, has not used any of those 12:22:04
3 trade secrets, would you agree with me that your 12:22:07
4 opinions are irrelevant to Otto Trucking? 12:22:10
5 MR. EISEMAN: Objection as to form. 12:22:13
6 A I'm not giving you a legal opinion. But 12:22:16
7 as -- my judgment as a damage expert, you are 12:22:17
8 correct. 12:22:20
9 Q (BY MR. SCHUMAN) You mentioned that you 12:22:29
10 had documents in this case from Uber with its own 12:22:31
11 modeling of the benefits of -- of -- well, let me -- 12:22:38
12 let me ask it -- strike that. Let me start that 12:22:44
13 question again. 12:22:47
14 Do you remember some testimony you gave in 12:22:48
15 response to Uber's counsel where you characterized 12:22:49
16 some of the information you got from -- that you 12:22:52
17 were able to review from Uber as the Rosetta Stone 12:22:55
18 in your field? 12:22:57
19 Do you remember that -- 12:22:59
20 A I -- 12:22:59
21 Q -- testimony? 12:22:59
22 A -- do remember that. 12:23:00
23 Q And -- and what is the information again 12:23:01
24 that you characterize as being the Rosetta Stone in 12:23:03
25 your field? 12:23:05

1 A Well, you know, I -- well, let me -- let 12:23:06
2 me give you an example of another case that I 12:23:07
3 testified in last year in a similar fact situation 12:23:10
4 of this case where there's no product in the market 12:23:13
5 yet. There's regulatory approvals that need to be 12:23:16
6 done that weren't done yet; that there would be no 12:23:20
7 commercialization for years into the future. And I 12:23:21
8 had the business plans of the company that took the 12:23:24
9 trade secrets. 12:23:30

10 Now, there they provided me the model, and 12:23:31
11 they never made a calculation of what the impact 12:23:36
12 would be on them to accelerate the development by 12:23:39
13 any amount of time. I had to get into their model, 12:23:43
14 understand the logic, and make that calculation 12:23:46
15 myself. 12:23:47

16 In this case I have the same thing in that 12:23:49
17 I have projections done at the time of the alleged 12:23:51
18 theft by the party who was alleged to have taken the 12:23:55
19 trade secrets. 12:23:59

20 But they have even gone to the next step 12:24:01
21 of actually quantifying the impact of acceleration, 12:24:04
22 and so that's why I say it's the Rosetta Stone. 12:24:07
23 Normally I have to do more work than I did in this 12:24:09
24 case, but Uber has done it for me. 12:24:12

25 Q Right. And have you seen any similar 12:24:17

1 documents from my client, Otto Trucking? 12:24:20

2 A I knew that was next question. The answer 12:24:23

3 is no. And you're closing the loop. 12:24:25

4 MR. SCHUMAN: Why don't we take a 12:24:32

5 two-minute break. I don't think I have anything 12:24:33

6 more, but why don't we just -- 12:24:36

7 MR. BERRY: I actually have a couple of 12:24:36

8 questions. 12:24:38

9 MR. SCHUMAN: Well, I'm not sure I'm done 12:24:38

10 yet. I just want to -- 12:24:40

11 MR. BERRY: Okay. 12:24:41

12 MR. SCHUMAN: -- take a two-minute break 12:24:41

13 and make sure. And then if you have something else. 12:24:41

14 MR. BERRY: Okay. 12:24:44

15 MR. SCHUMAN: -- you guys can take that 12:24:45

16 up. 12:24:46

17 THE VIDEOGRAPHER: It's 12:24 p.m. We're 12:24:47

18 going off the record. 12:24:49

19 (A break was taken from 12:24 p.m. to 12:24:51

20 12:28 p.m.) 12:25:12

21 THE VIDEOGRAPHER: We are back on the 12:28:09

22 record. It's 12:28 p.m. 12:28:09

23 Q (BY MR. SCHUMAN) Mr. Wagner, did either 12:28:15

24 the Quinn firm or Waymo ask you or your firm to 12:28:17

25 prepare any damages opinions specific to my client, 12:28:22

1 Otto Trucking? 12:28:27

2 A I don't recall that specific instruction. 12:28:28

3 Q As you sit here today, do you plan to do 12:28:31

4 any work between now and the time of trial on 12:28:33

5 developing opinions regarding damages specific to my 12:28:38

6 client, Otto Trucking? 12:28:45

7 A No. 12:28:46

8 MR. SCHUMAN: Okay. I have no further 12:28:47

9 questions for you. Thank you for your time. 12:28:49

10 A Thank you. 12:28:52

11 MR. EISEMAN: Mr. Berry, what do you 12:28:56

12 consider this -- these questions? Do you consider 12:28:58

13 them to be redirect? 12:28:59

14 MR. BERRY: I haven't even thought about 12:29:02

15 how to characterize it. 12:29:03

16 EXAMINATION BY COUNSEL FOR THE DEFENDANTS 12:29:08

17 BY MR. BERRY: 12:29:12

18 Q Mr. Wagner, I had a -- a couple of 12:29:12

19 questions. The first is: Your opinions in this 12:29:13

20 case assume that Uber is going to go to market and 12:29:15

21 commercialize its AV technology using the Fuji 12:29:19

22 LiDAR, right? 12:29:23

23 MR. EISEMAN: Objection as to form. 12:29:24

24 A I -- again, I -- I think that's assumed. 12:29:24

25 But again, that's a better question for 12:29:27

1 I, MARY J. GOFF, CSR No. 13427, Certified
2 Shorthand Reporter of the State of California,
3 certify;

4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth, at
6 which time the witness declared under penalty of
7 perjury; that the testimony of the witness and all
8 objections made at the time of the examination were
9 recorded stenographically by me and were thereafter
10 transcribed under my direction and supervision; that
11 the foregoing is a full, true, and correct
12 transcript of my shorthand notes so taken and of the
13 testimony so given;

14 That before completion of the deposition,
15 review of the transcript () was (XX) was not
16 requested: () that the witness has failed or
17 refused to approve the transcript.

18 I further certify that I am not financially
19 interested in the action, and I am not a relative or
20 employee of any attorney of the parties, nor of any
21 of the parties.

22 I declare under penalty of perjury under the
23 laws of California that the foregoing is true and
24 correct, dated this 23rd day of September, 2017.

25 

MARY J. GOFF, CSR No. 13427

Exhibit N

**UNREDACTED
VERSION
OF DOCUMENT
SOUGHT TO BE
SEALED**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,)
Plaintiff,)
v.) Case No.
UBER TECHNOLOGIES, INC.;) 3:17-cv-00939-WHA
OTTOMOTTO LLC;)
OTTO TRUCKING,)
Defendants.)
-----)

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF EDWARD RUSSO
WEDNESDAY, DECEMBER 20, 2017

REPORTED BY:

PAUL J. FREDERICKSON, CCR, CSR

JOB NO. 2771335

PAGES 1 - 367

Page 1

1	information in that deck about Uber's	15:36:19
2	competitors being reviewed with some of the	15:36:22
3	members of ATG?	15:36:24
4	A. That's my recollection.	15:36:25
5	Q. Let me show you previously marked	15:36:45
6	Exhibit 9206.	15:36:45
7	[Document passed to the witness.]	15:36:46
8	Q. Have you seen this document	15:37:13
9	before?	15:37:14
10	A. Yes.	15:37:14
11	Q. In what context?	15:37:16
12	A. As I recall, I prepared it shortly	15:37:19
13	after I was hired.	15:37:24
14	Q. Did you give it to anyone else	15:37:26
15	in -- on your team?	15:37:28
16	A. I submitted it to Mr. Gicinto,	15:37:29
17	yes.	15:37:33
18	Q. Did he give you feedback?	15:37:34
19	A. Yeah, I mean, he thanked me for	15:37:36
20	the -- the document, and then that was about	15:37:39
21	it. I don't -- I don't recall us ever doing	15:37:43
22	anything with it.	15:37:46
23	Q. This says "Draft" on each page.	15:37:46
24	Do you recall whether there were other versions	15:37:48
25	of this document?	15:37:50

1 A. As I recall, this was the only, 15:37:51
2 the only one I prepared, and that's why it says 15:37:54
3 draft because it never -- never went any 15:37:57
4 further. 15:37:59
5 Q. Did Mr. Gicinto ask you to prepare 15:37:59
6 this? 15:38:03
7 A. Yes. 15:38:03
8 Q. And where did the information in 15:38:03
9 this document come from? 15:38:06
10 A. Everything in this document would 15:38:10
11 have come from -- I'd have to read the -- the 15:38:12
12 whole thing. 15:38:15
13 Q. Well, let me ask a different 15:38:28
14 question. 15:38:30
15 A. Yes. 15:38:31
16 Q. If you look at the -- on the 15:38:32
17 second page -- 15:38:35
18 A. Right. 15:38:35
19 Q. -- it says "Collection strategy." 15:38:36
20 And what's that intended to convey? 15:38:37
21 A. Collection strategy. 15:38:48
22 [Pause.] 15:38:48
23 A. The whole -- it's intended to 15:39:13
24 convey just that, how we would do our research 15:39:15
25 into the various competitors. 15:39:19

1 And -- so you're -- what you're 15:54:40
2 saying -- we talked about Iden earlier; 15:54:40
3 correct? 15:54:43
4 A. Right, yep. 15:54:43
5 Q. And you had said that you believed 15:54:43
6 all of these Idens, C, D, E, F, G and H, were 15:54:45
7 Chinese competitors? 15:54:53
8 A. There were other competitors. I 15:54:55
9 believe the majority of them were Chinese, yes. 15:54:57
10 Q. But what you're saying here is 15:55:00
11 that Iden I and Iden J are -- are 15:55:01
12 identifications of the ATG group at Uber -- 15:55:06
13 A. Uh-huh. 15:55:11
14 Q. -- and the Otto company -- 15:55:12
15 A. Right. 15:55:12
16 Q. -- respectively; is that right? 15:55:14
17 A. Yes. 15:55:16
18 Q. And then it says: 15:55:21
19 "The purpose of these meetings 15:55:22
20 will be to gather assessment on the claims of 15:55:23
21 competitors as to their progress in the AV 15:55:25
22 race" -- 15:55:27
23 A. Right. 15:55:27
24 Q. -- "and then to identify which 15:55:27
25 specific techniques and technologies are likely 15:55:29

1 to lead to success and which are red herrings." 15:55:32

2 Do you know if this was done? 15:55:34

3 A. It was not done. 15:55:35

4 Q. Do you know why? 15:55:36

5 A. Yeah. Again, this, this document 15:55:38

6 I prepared at Mr. Gicinto's request last year. 15:55:41

7 It was conceptual in nature, and most of what's 15:55:46

8 in here we never did. We didn't actually make 15:55:50

9 any kind of concerted effort until after the 15:55:56

10 meeting with -- with Mr. Ron, and that's when 15:55:58

11 those requirements came in. 15:56:00

12 Q. Do you see that after internal 15:56:07

13 resources, there's a little asterisk? 15:56:09

14 A. Internal resources, little 15:56:09

15 asterisk. Yes. 15:56:14

16 Q. I'm looking at page 626. 15:56:15

17 A. Yes. 15:56:17

18 Q. Okay. 15:56:17

19 And does that asterisk refer to 15:56:17

20 what's on page 628, the asterisk there, the 15:56:19

21 note? 15:56:23

22 A. Yes. 15:56:35

23 Q. Okay. 15:56:35

24 And is what's being conveyed here 15:56:44

25 that when you're meeting with some of the 15:56:47

1 employer? 16:01:45

2 A. We never did it, so the question 16:01:46

3 is hypothetical. But, of course, it would have 16:01:47

4 mattered. 16:01:49

5 Q. Well, you were suggesting that 16:01:49

6 that's one thing that should be done here in 16:01:51

7 this document; right? 16:01:53

8 A. That could be done, sure. 16:01:54

9 Q. Okay. 16:01:54

10 And did you discuss that with 16:01:56

11 Mr. Gicinto? 16:01:58

12 A. I don't recall having that 16:02:02

13 discussion with him specifically, no. 16:02:04

14 Q. All right. 16:02:04

15 Do you recall having a discussion 16:02:08

16 with anyone in your group? 16:02:11

17 A. About that? 16:02:12

18 Q. Yes. 16:02:12

19 A. No. Again, I prepared this 16:02:14

20 document and shared it with Mr. Gicinto. 16:02:15

21 Essentially, I mean, it never really went 16:02:19

22 anywhere. We never ended up doing or executing 16:02:21

23 any of this. 16:02:25

24 Q. Well, you executed some of it? 16:02:27

25 A. Some of it, yes. 16:02:28

C E R T I F I C A T E

I, PAUL J. FREDERICKSON, CA
Certified Shorthand Reporter No. 13164 and
WA Certified Court Reporter No. 2419, do
hereby certify:

That prior to being examined,
the witness named in the foregoing
deposition was by me duly sworn or affirmed
to testify to the truth, the whole truth and
nothing but the truth;

That said deposition was taken
down by me in shorthand at the time and
place therein named, and thereafter reduced
to print by means of computer-aided
transcription; and the same is a true,
correct and complete transcript of said
proceedings.

I further certify that I am not
interested in the outcome of the action.

1 Witness my hand this 21st day
2 of December 2017.

3
4 
5

6 PAUL J. FREDERICKSON, CCR, CSR

7 WA CCR 2419 CA CSR 13164

8 Expiration date: March 31, 2018
9

UNREDACTED VERSION
OF EXHIBIT 2
SOUGHT TO BE
FILED UNDER SEAL

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Waymo LLC,

Plaintiff,

v.

Uber Technologies, Inc.; Ottomotto LLC; Otto
Trucking LLC,

Defendants.

Case No. 3:17-cv-00939

**DEFENDANT OTTO TRUCKING LLC'S
OBJECTIONS AND RESPONSES TO
PLAINTIFF WAYMO LLC'S THIRD SET
OF EXPEDITED INTERROGATORIES**

Trial Date: October 10, 2017

PROPOUNDING PARTY: Plaintiff: WAYMO LLC

RESPONDING PARTY: Defendant: OTTO TRUCKING LLC

SET NO.: Third Set of Expedited Interrogatories

1 Interrogatories were asked of, or statements contained herein were made by, a witness present and
2 testifying in court, all of which objections and grounds are reserved and may be interposed at the
3 time of trial.

4
5 **GENERAL OBJECTIONS**

6 1. Otto Trucking objects to each and every Interrogatory to the extent it seeks to impose
7 obligations and demands upon Otto Trucking beyond those required by Federal Rules of Civil
8 Procedure 26 and 33, and the applicable Local Civil Rules of the United States District Court for the
9 Northern District of California (“Local Rules”).

10 2. Otto Trucking objects to each and every Interrogatory to the extent it seeks
11 information protected from discovery by the attorney-client privilege, the work product doctrine, or
12 any other privileges or reasons for non-production. Waymo’s discovery will not be construed to
13 seek such information. Inadvertent disclosure of privileged information is not intended to be, and
14 may not be construed as, a waiver of any applicable privilege or similar basis for non-disclosure.

15 3. Otto Trucking objects to these Interrogatories to the extent they seek information
16 concerning matters or issues beyond the scope of the allegations in the Amended Complaint on the
17 grounds that such discovery is overbroad, unduly burdensome, and neither relevant to any issue in
18 this case nor reasonably calculated to lead to the discovery of admissible evidence.

19 4. Otto Trucking objects to each Interrogatory to the extent that it is unlimited in time
20 and scope, especially in light of the expedited nature of the propounded Interrogatories.

21 5. Otto Trucking reserves all rights under the Rules of Civil Procedure to amend or
22 supplement its responses as additional information is discovered.

23 **SPECIFIC OBJECTIONS AND RESPONSES TO INTERROGATORIES**

24 **INTERROGATORY NO. 21:**

25 Describe in detail the development of the FAC lenses used by DEFNDANTS in their LIDAR
26 designs and devices, including who contributed to the design, and when and how the lens
27 prescription, material, and manufacturer were first selected and evolved over time, and the identity,
28 by Bates Number of the DOCUMENTS evidencing the same.

1 **RESPONSE TO INTERROGATORY NO. 21:**

2 Otto Trucking incorporates each of its general objections by reference. Otto Trucking further
3 objects to this Interrogatory as not “reasonably narrow” or relevant to its “trade secret
4 misappropriation claims only,” as required by the Court’s Order Granting in Part and Denying in
5 Part Plaintiff’s Motion for Provisional Relief. (Dkt. No. 464).

6 Subject to and without waiving the foregoing objections, Otto Trucking responds as follows:
7 Otto Trucking does not and has not developed FAC lenses in LiDAR designs or devices. Otto
8 Trucking does not have information responsive to Interrogatory No. 21.

9 **INTERROGATORY NO. 22:**

10 Describe in detail the development of the photodetectors and photodetector circuits
11 implemented by UBER or OTTO for LIDAR, including who contributed to the design and when,
12 and the identity by Bates Number, of the DOCUMENTS evidencing the same.

13 **RESPONSE TO INTERROGATORY NO. 22:**

14 Otto Trucking incorporates each of its general objections by reference. Otto Trucking further
15 objects to this Interrogatory as not “reasonably narrow” or relevant to its “trade secret
16 misappropriation claims only,” as required by the Court’s Order Granting in Part and Denying in
17 Part Plaintiff’s Motion for Provisional Relief. (Dkt. No. 464).

18 Subject to and without waiving the foregoing objections, Otto Trucking responds as follows:
19 Otto Trucking does not and has not developed photodetectors or photodetector circuits. Otto
20 Trucking does not have information responsive to Interrogatory No. 22.

21 **INTERROGATORY NO. 23:**

22 Describe in detail the development of DEFENDANTS’ amplified fiber laser for LIDAR,
23 including who contributed to the design, how the fiber stages, lengths, and doping concentrations
24 were first selected and evolved over time, how the materials and manufacturer were first selected
25 and evolved over time, and the identity, by Bates Number, of the documents evidencing the same.
26
27
28

1 **RESPONSE TO INTERROGATORY NO. 23:**

2 Otto Trucking incorporates each of its general objections by reference. Otto Trucking further
3 objects to this Interrogatory as not “reasonably narrow” or relevant to its “trade secret
4 misappropriation claims only,” as required by the Court’s Order Granting in Part and Denying in
5 Part Plaintiff’s Motion for Provisional Relief. (Dkt. No. 464).

6 Subject to and without waiving the foregoing objections, Otto Trucking responds as follows:
7 Otto Trucking does not and has not developed amplified fiber lasers, or fiber stages, lengths and
8 doping concentrations of amplified fiber lasers. Otto Trucking does not have information responsive
9 to Interrogatory No. 23.

10 **INTERROGATORY NO. 24:**

11 Identify the components of DEFENDANTS’ self-driving vehicles that LEVANDOWSKI
12 contributed to.

13 **RESPONSE TO INTERROGATORY NO. 24:**

14 Otto Trucking incorporates each of its general objections by reference. Otto Trucking further
15 objects to this Interrogatory as not “reasonably narrow” or relevant to its “trade secret
16 misappropriation claims only,” as required by the Court’s Order Granting in Part and Denying in
17 Part Plaintiff’s Motion for Provisional Relief. (Dkt. No. 464). Otto Trucking objects to the terms
18 “components” and “contributed to” as vague and ambiguous.

19 Subject to and without waiving the foregoing objections, Otto Trucking responds as follows:
20 Otto Trucking and its wholly owned subsidiary Otto Transport LLC own a number of trucks, some
21 of which use self-driving technology from third parties other than Uber or Ottomotto. To the extent
22 that Otto Trucking has made use of any self-driving vehicle technology, it has only used LiDAR
23 products from Velodyne or Ibeo. To the best of Otto Trucking’s knowledge, Mr. Levandowski has
24 not built hardware or software for self-driving vehicle technology used by Otto Trucking.

25 **INTERROGATORY NO. 25:**

26 Identify the components of DEFENDANTS’ self-driving vehicles that LEVANDOWSKI did
27 not contribute to.

1 on April 28, 2017 in Defendants' Privilege Log Associated with March 31, 2017 Production of
2 Documents, on May 1, 2017 in Defendants' Privilege Log Associated with March 31, 2017
3 Production of Documents, and on May 22, 2017 in Uber Technologies, Inc. and Ottomotto LLC's
4 Privilege Log 5.22.2017 (O'Melveny & Myers LLP). Otto Trucking is not aware of further
5 information responsive to this Interrogatory.

6 **INTERROGATORY NO. 27:**

7 Describe the meetings that took place in San Francisco between LEVANDOWSKI and
8 UBER on or around January 12, 2016, including an identification of who was present (whether in
9 person or telephonically) and the subject matter of what was discussed.

10 **RESPONSE TO INTERROGATORY NO. 27:**

11 Otto Trucking incorporates each of its general objections by reference. Otto Trucking further
12 objects to this Interrogatory as not "reasonably narrow" or relevant to its "trade secret
13 misappropriation claims only," as required by the Court's Order Granting in Part and Denying in
14 Part Plaintiff's Motion for Provisional Relief. (Dkt. No. 464). Otto Trucking further objects to this
15 Request to the extent that it seeks communications protected by the joint defense or common interest
16 privilege. Otto Trucking further objects to this Request to the extent that it seeks communications
17 protected by the attorney client privilege, the attorney work product doctrine, and/or any other
18 applicable privilege or immunity.

19 Subject to and without waiving the foregoing objections, Otto Trucking responds as follows:
20 Otto Trucking does not have information responsive to Interrogatory No. 27. Otto Trucking's
21 predecessor, 280 Systems LLC, was incorporated on February 1, 2016, and as such Otto Trucking
22 was not present at that meeting.

23 **INTERROGATORY NO. 28:**

24 Describe any alternate LIDAR designs that UBER or OTTO considered for Fuji that did not
25 include [REDACTED] and
26 identify, by Bates Number, the documents evidencing the same.
27
28

RESPONSE TO INTERROGATORY NO. 28:

Otto Trucking incorporates each of its general objections by reference. Otto Trucking further objects to this Interrogatory as not “reasonably narrow” or relevant to its “trade secret misappropriation claims only,” as required by the Court’s Order Granting in Part and Denying in Part Plaintiff’s Motion for Provisional Relief. (Dkt. No. 464). Otto Trucking objects to this Interrogatory as vague and ambiguous in its use of the term “Otto.” As such, Otto Trucking will respond with respect to Otto Trucking. Otto Trucking objects to this Interrogatory as overly broad and unduly burdensome, in particular in its use of the term “any” alternate LiDAR designs.

Subject to and without waiving the foregoing objections, Otto Trucking responds as follows: Otto Trucking has not considered any LiDAR designs for Fuji or for any other project. Otto Trucking does not have information responsive to Interrogatory No. 28.

Dated: June 20, 2017

Respectfully submitted,

By: /s/ Neel Chatterjee

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EXHIBIT 1

***UNREDACTED VERSION
OF DOCUMENT(S)
SOUGHT TO BE SEALED***

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 WAYMO LLC

14 Plaintiffs,

15 v.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO, LLC; OTTO TRUCKING
18 LLC,

19 Defendants.

Case No. 17-cv-00939-JCS

**PLAINTIFF’S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
OTTO TRUCKING, LLC’S FIRST SET OF
INTERROGATORIES (NOS. 1-14)**

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1 INTERROGATORY NO. 10:

2 Identify all damage, including a specific calculation of monetary damages, caused by any
3 alleged misappropriation of trade secrets by Otto Trucking.
4

5 RESPONSE TO INTERROGATORY NO. 10:

6 Waymo incorporates by reference its General Objections. Waymo further objects to this
7 interrogatory on the grounds that it is vague and ambiguous, including with respect to the phrase
8 “all damage.” Waymo further objects to this request to the extent it is compound, complex, and
9 contains multiple subparts. Waymo further objects to this interrogatory as premature to the extent
10 it calls for information that is subject to expert testimony. Waymo will provide expert testimony
11 in accordance with the Court’s procedural schedule.

12 Subject to and without waiving the foregoing General and Specific Objections, Waymo
13 responds as follows:

14 Waymo believes it has suffered and is suffering irreparable harm as a result of Otto
15 Trucking’s trade secret misappropriation. In addition, Waymo believes it is entitled to damages
16 for Otto Trucking’s trade secret misappropriation, particularly to the extent Otto Trucking has
17 used Waymo’s trade secrets to fast-track LiDAR development for its own benefit or for the benefit
18 of Ottomotto or Uber. Waymo is continuing its discovery into the nature and extent of Otto
19 Trucking’s use of Waymo’s trade secrets for its benefit, for the benefit of Ottomotto, and/or for the
20 benefit of Uber. Waymo is also continuing its discovery into the role of Otto Trucking vis-à-vis
21 Ottomotto and Uber as a conduit of misappropriated information from Mr. Levandowski and
22 Ottomotto/Uber. A specific calculation of monetary damages caused by Otto Trucking’s
23 misappropriation cannot be provided until this discovery is more substantially complete.

24 Waymo expects to calculate past damages based on lost profits, unjust enrichment, and
25 reasonable royalty metrics. To the extent an injunction is not granted, Waymo will also seek
26 damages, based on these same metrics, tied to any continuing use of Waymo’s trade secrets.

27 Inputs to Waymo’s damages analysis vis-à-vis Otto Trucking include, for example: the
28 extent, duration, and purpose of trade secret misappropriation; estimates of future profits and cash

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1 flows to be earned by Otto Trucking (or those benefiting from its trade secret misappropriation)
2 and Waymo; assessments and projections regarding the relevant markets, competition therein, and
3 the relevant parties’ competitive positions; investment in LiDAR technology (in time, capital,
4 engineering costs, and other expenditures); and valuations of the relevant technology. Discovery
5 on these subjects is ongoing.

6 Waymo further seeks a judgment that this case is exceptional and an award of Waymo’s
7 costs and reasonable attorneys’ fees. Waymo also seeks an accounting of all sales and revenues,
8 together with pre-judgment and post-judgment interest. Waymo further seeks enhanced damages
9 for Defendants’ willful and malicious conduct in misappropriating Waymo’s trade secrets,
10 punitive damages, and other relief including but not limited to disgorgement of profits from unjust
11 enrichment. Waymo seeks any other relief available under applicable law. It would be premature
12 to estimate the amount of damages at this time.

13 Discovery is ongoing and Waymo reserves the right to supplement – and anticipates
14 regularly supplementing – this response after further discovery and investigation into Otto
15 Trucking’s misappropriation of Waymo’s trade secrets and the benefits obtained by Defendants as
16 a result of that misappropriation.

17
18 FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:

19 Waymo objects to this interrogatory on the grounds that it is vague and ambiguous,
20 including with respect to the phrase “all damage.” Waymo further objects to this interrogatory to
21 the extent it is compound, complex, and contains multiple subparts. Waymo further objects to this
22 interrogatory as premature to the extent it calls for information that is subject to expert testimony.
23 Waymo will provide expert testimony in accordance with the Court’s procedural schedule.

24 Subject to and without waiving the foregoing objections, Waymo responds as follows:

25 Waymo’s technical expert is continuing to assess Defendants’ use of Waymo’s trade
26 secrets; such assessments will ultimately inform the damages analysis in this case. Moreover,
27 Defendants have not yet responded to Waymo’s damages-related discovery requests. Therefore,
28

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1 Waymo’s expert has not concluded his analysis and is not expected to do so until the time that
 2 expert reports are due on August 24, 2017.

3 Discovery in this case is ongoing, and Waymo is still waiting for substantive responses to
 4 its Fourth Set of Requests for Production (Nos. 266-297) and First Set of Common and Specific
 5 Interrogatories, all of which relate to damages. Specifically, Waymo expects Defendants’
 6 responses to the following document requests and interrogatories to inform its response to this
 7 interrogatory, and Waymo expects to supplement its response to this interrogatory when it
 8 receives Defendants’ document production and interrogatory responses:

- 9 • DOCUMENTS sufficient to show UBER’s market capitalization and internal
 10 valuation of itself on a quarterly basis, from the year prior to the year in which
 11 UBER first contemplated developing autonomous vehicles through the present.
- 12 • DOCUMENTS sufficient to show the impact of developing autonomous vehicles
 13 on Uber’s internal valuation of itself from the year prior to the year in which UBER
 14 first contemplated developing autonomous vehicles through the present.
- 15 • DOCUMENTS describing UBER’s development of autonomous vehicles as
 16 necessary to the continued viability of UBER or to the continued viability of any
 17 aspect of UBER’s business, INCLUDING but not limited to characterizations of a
 18 competitor’s development or deployment of autonomous vehicles as an existential
 19 threat to UBER.
- 20 • DOCUMENTS sufficient to show each iteration of DEFENDANTS’ plan to launch
 21 any autonomous vehicles in any geographic region from the time DEFENDANTS
 22 first contemplated developing or deploying autonomous vehicles to the present.
- 23 • DOCUMENTS sufficient to show DEFENDANTS’ estimates of the size of the
 24 ridesharing market and DEFENDANTS’ share of that market in the United States
 25 for each of the last six years on a quarterly basis. To the extent DEFENDANTS
 26 break out such estimates by geography (region, city, etc.), those estimates should
 27 also be provided.
- 28 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts of the size of the
 ride-sharing market, the percentage of the ride-sharing market that will be serviced
 by autonomous vehicles, and DEFENDANTS’ share of that market in the United
 States (by autonomous vehicles and vehicles driven by contractors) for any period
 of time forecasted by UBER, on a quarterly basis. To the extent DEFENDANTS
 break out such estimates by geography (country, region, city, etc.), those estimates
 should also be provided. To the extent DEFENDANTS create different forecasts
 based on different assumptions, documents REGARDING each forecast – with
 documents sufficient to show the assumptions for each – should be provided.

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- 1 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts REGARDING the
2 number of DEFENDANTS’ ride-sharing vehicles in the United States (by
3 autonomous vehicles and vehicles driven by contractors), for any period of time
4 forecasted by UBER —broken out by on a quarterly basis. To the extent
5 DEFENDANTS break out such estimates by geography (country, region, city, etc.),
6 those estimates should also be provided. To the extent DEFENDANTS create
7 different forecasts based on different assumptions, documents REGARDING each
8 forecast – with documents sufficient to show the assumptions for each – should be
9 provided.
- 10 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
11 operating plans, marketing plans, financial plans, sales plans, and investment plans
12 for its ridesharing business, INCLUDING projections for revenue generation and
13 profitability.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
15 operating plans, marketing plans, financial plans, sales plans, and investment plans
16 for its autonomous vehicle program, INCLUDING projections for revenue
17 generation and profitability of the autonomous vehicle program.
- 18 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of any barriers to
19 entry in the ride-sharing market and the status of any attempts by DEFENDANTS
20 to enforce such barriers against competitors INCLUDING WAYMO, INCLUDING
21 investments and infrastructure needed.
- 22 • DOCUMENTS REGARDING DEFENDANTS’ discussion of WAYMO or its
23 business, INCLUDING DEFENDANTS’ analysis of WAYMO’s impact or
24 potential impact on the ridesharing market or on UBER.
- 25 • DOCUMENTS sufficient to identify the date that UBER first considered deploying
26 autonomous vehicles.
- 27 • DOCUMENTS sufficient to identify the date that UBER first considered
28 developing its own autonomous vehicles.
- DOCUMENTS sufficient to identify the date that UBER first considered
developing its own in-house LiDAR.
- DOCUMENTS REGARDING the importance of a first-mover advantage in
commercializing autonomous vehicles, INCLUDING any estimates of the market
shares of other entrants that are not first to market.
- DOCUMENTS REGARDING the importance of LiDAR, INCLUDING the
importance of low-cost LiDAR, to DEFENDANTS’ ability to compete.

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- 1 • DOCUMENTS REGARDING the relative value of safety (vis-à-vis, for example,
2 cost and timing of entry into relevant markets) in the commercialization of
3 autonomous vehicles.
- 4 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of WAYMO’s
5 technological lead REGARDING autonomous vehicle technology (INCLUDING
6 DEFENDANTS’ estimates of the time, personnel, and investment needed to close
7 the gap between DEFENDANTS and WAYMO), and documents sufficient to show
8 how DEFENDANTS’ analysis or estimates have changed over time.
- 9 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
10 technological lead over DEFENDANTS REGARDING autonomous vehicle
11 technology (INCLUDING DEFENDANTS’ estimates of the time, personnel, and
12 investment needed to close the gap between DEFENDANTS and WAYMO)
13 changed after Uber’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
15 technological lead over DEFENDANTS REGARDING LiDAR technology (INCLUDING
16 DEFENDANTS’ estimates of the time, personnel, and investment
17 needed to close the gap between DEFENDANTS and WAYMO) changed after
18 UBER’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 19 • DOCUMENTS sufficient to show DEFENDANTS’ comparisons of the cost and
20 profitability of a human-driven versus an autonomous vehicle in a ride-sharing
21 fleet.
- 22 • DOCUMENTS sufficient to show the historical and current cost of
23 DEFENDANTS’ autonomous vehicles, broken down by component, and dating
24 back to the inception of DEFENDANTS’ autonomous vehicle program. As noted
25 in the Instructions above, to the extent DEFENDANTS can provide separate
26 information for each Defendant, DEFENDANTS should do so.
- 27 • DOCUMENTS sufficient to show DEFENDANTS’ total financial investment
28 including but not limited to employee time, purchase of capital equipment, and
outside consultants, by quarter, into its efforts to develop in-house LiDAR. As
noted in the Instructions above, to the extent DEFENDANTS can provide separate
information for each Defendant, DEFENDANTS should do so.
- DOCUMENTS sufficient to show DEFENDANTS’ investment, in terms of time
including but not limited to engineers, software developers, managers, and
executives (broken out by each category of employee), into its efforts to develop in-
house LiDAR. As noted in the Instructions above, to the extent DEFENDANTS

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1 can provide separate information for each Defendant, DEFENDANTS should do
2 so.

- 3 • Patent licenses or agreements relating to LiDAR.
- 4 • DOCUMENTS sufficient to show the impact to DEFENDANTS of having to
5 redesign Fuji to avoid using the trade secrets identified in response to UBER’s
6 interrogatory No. 1.
- 7 • DOCUMENTS sufficient to show any valuation (whether conducted by UBER or
8 by a third party) of the assets and technology acquired in the acquisition of Otto by
9 Uber, INCLUDING valuations performed for the purpose of purchase price
10 accounting or any other purpose.
- 11 • DOCUMENTS sufficient to show any DEFENDANTS’ projected revenue, gross
12 margin, and operating profit for any division including autonomous vehicles.
- 13 • DOCUMENTS sufficient to show any the financials, INCLUDING profit and loss
14 statements and balance sheet, for OTTOMOTTO, OTTO TRUCKING, and any
15 division of UBER including autonomous vehicles.
- 16 • DOCUMENTS sufficient to show DEFENDANTS’ approved requests for capital
17 expenditure authorizations related to its autonomous vehicle program,
18 INCLUDING R&D expenditures, technology/equipment acquisitions, and
19 marketing expenditures.
- 20 • Describe in detail the impact, including financial impact, to DEFENDANTS of
21 having to redesign Fuji to avoid using the trade secrets identified in response to
22 UBER’s Interrogatory No. 1.
- 23 • To the extent DEFENDANTS contend they will be irreparably harmed by a
24 permanent injunction prohibiting the use of WAYMO’s trade secrets in this case,
25 describe in detail the factual and legal bases for that contention.
- 26 • Describe in detail DEFENDANTS’ investment in developing in-house LiDAR.
27 This should include DEFENDANTS’ financial investment, as well as
28 DEFENDANTS’ investment in terms of time and personnel.
- Describe in detail [OTTOMOTTO and OTTO TRUCKING’s] efforts to place a
value on OTTOMOTTO and/or OTTO TRUCKING or their respective assets and
technology as part of UBER’S acquisition of OTTOMOTTO and/or OTTO
TRUCKING, either prior to or following the acquisition.
- Describe in detail UBER’s efforts to place a value on OTTOMOTTO and/or OTTO
TRUCKING or their respective assets and technology as part of the acquisition,
either prior to or following the acquisition, including but not limited to the efforts
described by Nina Qi during her deposition at Rough Tr. 192:4-199:15.

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- IDENTIFY the date that UBER first considered developing its own in-house LiDAR and the date UBER began developing its own in-house LiDAR (to the extent it differs from the date UBER began considering it), and describe in detail UBER’s reasons for wanting to develop its own in-house LiDAR.

Damages for Violations of Defense of Trade Secrets Act and California Uniform Trade Secret Act

Uber, Ottomotto, and Otto Trucking are jointly and severally liable for damages in this case. Ottomotto and Otto Trucking are the corporate vehicles for the misappropriation of Waymo’s trade secrets for the benefit of Uber. Anthony Levandowski officially formed Ottomotto on January 15, 2016 (while he was simultaneously employed by Waymo, consulting with Uber on Uber's self-driving car project, and negotiating the acquisition of Ottomotto). He officially formed Otto Trucking on February 1, 2016 (five days after resigning from Waymo and while he was consulting with Uber on Uber's self-driving car project and negotiating the acquisition of Otto Trucking). Mr. Levandowski was acting for all three Defendants at various times in order to facilitate the misappropriation of Waymo's trade secrets.

Uber entered into Agreements and Plans of Merger with each of Ottomotto and Otto Trucking on the same date, within weeks of the formation of those entities. (UBER00016757; UBER00016453). Pursuant to its Agreement and Plan of Merger, Otto Trucking was obligated and continues to be obligated to assign all of its intellectual property to Ottomotto (which has now been acquired by Uber). (UBER00016757.) Pending completion of the Otto Trucking acquisition by Uber, Anthony Levandowski remains one of two managing members of Otto Trucking and holds [REDACTED]. (OTTOTRUCKING00000004.) Uber has an exclusive option to acquire Otto Trucking between August 31, 2017 and November 30, 2017. (UBER00016757 at -764, -819.) If Uber does not acquire Otto Trucking during that period, Uber will be obligated to (i) become a 50% owner in Otto Trucking and (ii) to license Uber's self-driving technology (including all trade secrets) exclusively to Otto Trucking (even vis-à-vis Uber) for use in the commercialization of self-driving trucks. (UBER00016757 at -772.)

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1 Otto Trucking is jointly and severally liable for all damages caused by Defendants'
2 misappropriation of Waymo's trade secrets, including Defendants' unjust enrichment resulting
3 from Defendants' misappropriation, any reasonable royalty assessed as a result of Defendants'
4 misappropriation, and any exemplary damages, attorneys' fees, expert fees, and costs awarded as a
5 result of Defendants' misappropriation.

6 ***Unjust Enrichment Damages***

7 Uber, Ottomotto, and Otto Trucking have been unjustly enriched due to their
8 misappropriation of Waymo’s trade secrets. There are several measures that can be used to
9 quantify the unjust enrichment to Defendants. One measure of the unjust enrichment to
10 Defendants is the value that was paid (or will be paid) by Uber for Ottomotto and Otto Trucking
11 (collectively, “Otto”). When Uber began negotiating with Mr. Levandowski, Otto was a company
12 that did not exist, and did not have any products. (Qi Tr. 146:8-18.) And at that time, Uber was
13 aware that he still had confidential information from Waymo. (Bares Tr. at 179:14-18.) John
14 Bares, Operations Director in Uber’s Advanced Technology Group, was personally responsible for
15 negotiating aspects of Uber’s acquisition of Otto on Uber’s behalf, including a series of technical
16 milestones regarding LiDAR. He admitted that having access to Waymo’s specifications for
17 medium and long-range LiDAR would have been useful for someone trying to build medium and
18 long-range LiDAR at Uber because Waymo is “eight years ahead” and “had custom lasers.” (*Id.*
19 179:19-180:12.) Defendants do not dispute that Mr. Levandowski had access to Waymo’s files at
20 this time—as a result of both his ongoing employment at Waymo, and his illicit downloads.

21 Uber and Otto began negotiating the term sheet for the acquisition of Otto in January and
22 February 2016, with the final term sheet executed on February 22, 2016. (UBER00017518-578;
23 UBER00069043-064.) For at least some of this period, Mr. Levandowski was still an employee of
24 Google. Because Otto had no products when Uber and Otto began negotiating (Qi Tr. 146:8-18),
25 the only things of value to be acquired by Uber were likely (1) the engineers that Uber acquired;
26 and (2) Waymo’s technology. Therefore, the misappropriated trade secrets represented a
27 significant portion of the assets acquired by Uber, as well as the talents of the employees that
28 would be engaged in connection with the acquisition.

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1 Uber and Otto entered into the formal Agreement and Plan of Merger on April 11, 2016.
2 (UBER00016453-16523; UBER00016757.) Prior to entering into the agreement, Uber’s Board of
3 Directors approved the acquisition. Discovery regarding Uber’s internal valuation of Otto
4 (including information regarding the assumptions underlying Uber’s internal valuation of Otto)
5 will further inform Waymo’s unjust enrichment analysis. However, Nina Qi testified that Uber
6 told its Board that the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-
7 103.) Although Uber’s payment to Otto was conditioned on certain milestones that stretched for
8 some time into the future, this value is a reasonable measure of the present value of the transaction
9 given that it was the value presented to Uber’s Board of Directors in the Board’s consideration and
10 approval of the acquisition.

11 Another measure of the unjust enrichment to Defendants is the present value of the
12 additional cash flows that Defendants will earn as a result of Uber’s accelerated development of
13 self-driving car technology. Uber expected that acquiring Otto would accelerate the development
14 of its LiDAR technology. For example, when considering the acquisition, Uber estimated that
15 acquiring Otto could shorten its autonomous vehicle timeline by one to two years.
16 (UBER00069030-033 at ‘033.) Even under its “most conservative case,” Uber estimated the
17 increased present value of incremental profit (as measured by EBIT, or Earnings Before Interest
18 and Taxes) from Otto’s technology would be between \$836 million and \$1.69 billion.
19 (UBER00069030-033 at ‘033.) In addition to the increased profits, Uber recognized Waymo was
20 a threat to its entire existence, potentially placing its entire business at risk—something that,
21 according to public reports, is worth approximately \$70 billion. (See
22 [https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)
23 [industry-watchers/](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)). For example, Uber’s then-CEO was quoted as follows: “The minute it was
24 clear to us that our friends in Mountain View were going to be getting in the ride sharing space,
25 we needed to make sure there is an alternative [self-driving car]. Because if there is not, we’re not
26 going to have any business.” He also described developing an autonomous vehicle as “basically
27 existential for us.” (UBER0006042-047 at ‘043; UBER0006035-041 at ‘037; UBER00064472-
28 473; LEV_001940-051 at ‘940.) In messaging notes related to the acquisition, Uber’s then-CEO

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1 noted “Autonomous transportation is very possibly a winner-take-all, and thus existential for
2 Uber.” (UBER00064468-469 at ‘468.) Similarly, Jeff Holden, Uber’s Chief Product Officer,
3 wrote: “This war for self-driving is truly existential for Uber: we’ll either start up our second S
4 curve of growth or we’ll die. There might be in-between cases, but it’s definitely easy to see how
5 the extremes could play out.” Discussing the competition with Google, Mr. Holden discusses the
6 battle and the war: “The *battle* is about what we need to do to get ourselves into a sufficiently
7 competitive position before December that G doesn’t walk away with the crown for future of ride
8 sharing. It’s about establishing beach heads, being in the game in a credible way. The *war* is
9 the long-term defeat of G and others so we afford ourselves the opportunity to extend our massive
10 scale business into the future. This will be about who gets NSD self-driving to scale first.”
11 (UBER00070108-110 at ‘108.)

12 Another measure of unjust enrichment to Defendants is the expected cost savings to
13 Defendants from using Waymo’s trade secrets in Uber’s LiDAR systems. Waymo has obtained
14 significant cost savings by developing custom, in-house LiDAR systems using its trade secrets.
15 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
16 as explained in more detail in Waymo’s response to Interrogatory No. 6, a mid-range LiDAR from
17 Velodyne costs approximately \$70,000. Uber has also recently purchased third-party LiDAR
18 units from [REDACTED] (UBER00086529.) By contrast, the materials needed for
19 Waymo’s own mid-range GBR3 LiDAR system, which uses the trade secrets at issue in this case,
20 cost just over \$5,000. (See Waymo’s Response to Interrogatory No. 6 and all supplements
21 thereto.)

22 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
23 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
24 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
25 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
26 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
27 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
28 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-

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1 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
2 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
3 systems in 2018.

4 Another measure of unjust enrichment to Defendants is the expected cost savings due to
5 reduced development expenses from using Waymo’s trade secrets in Uber’s LiDAR systems.
6 While considering the acquisition of Otto, Uber recognized one important benefit was that the
7 acquisition “decreases total investment in [Autonomous Vehicle] development.”
8 (UBER00068983) An internal Uber email estimates that Uber’s acquisition of Otto saved Uber at
9 least a year in the race to large scale autonomous vehicle deployment, and describes Uber’s next
10 best choice as building the team internally with a two to four year lag versus what the Otto team
11 would bring. (UBER00060147-156 at ‘147.) One way to measure the costs that Defendants saved
12 through their misappropriation of Waymo’s trade secrets is by looking at the costs that Waymo
13 incurred to develop those trade secrets. As discussed in Waymo’s response to interrogatory 6,
14 Waymo has incurred up to \$1.1 billion to develop the trade secrets. (See Waymo’s 7/13
15 Supplemental Response to Interrogatory No. 6 and all supplements thereto.)

16 Waymo anticipates that Defendants will argue that the measures of unjust enrichment
17 discussed above are measures of value for the entirety of the company (Otto) acquired by Uber.
18 Waymo expects to rebut any evidence presented by Defendants that a portion of any value can be
19 attributed to any contributions other than Waymo’s trade secrets. Nonetheless, Waymo addresses
20 apportionment below.

21 Otto had no products when Uber and Otto began negotiating. (Qi Tr. 146:8-18.) And
22 Otto’s profit and loss statement for January through March 2016 reflects less than \$1.4 million of
23 expenses. (UBER00060164 and UBER00060165). Therefore, the only things of value to be
24 acquired by Uber were likely (1) the engineers that Uber acquired; and (2) Waymo’s technology.
25 Waymo is still conducting discovery regarding what assets (if any) Otto had when Uber decided to
26 acquire it. To the extent Otto had any working products or technology by the time Uber agreed to
27 acquire it, Waymo’s unjust enrichment analysis would account for that by deducting the value of
28 Otto’s then-existing technology. However, as previously discussed, Waymo expects the large

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1 majority of the measures of value discussed above to be attributable to the value of the stolen
2 information and engineers that Uber acquired in the transaction.

3 With respect to the value of the engineers Uber acquired from Otto, talented engineers in
4 the autonomous vehicle field are few and far between. In particular, some of the engineers who
5 left Waymo to join Otto, and who were eventually acquired by Uber, had very specialized skill
6 sets, including Don Burnette, Claire Delaunay, Gaetan Pennecot and Mr. Levandowski himself.
7 These engineers would likely be worth more than an average engineer, and more than even an
8 average autonomous vehicle engineer. Waymo is still obtaining discovery regarding Uber’s
9 valuation of the engineers that it acquired, but one public estimate of the value of engineers in the
10 autonomous vehicle industry is \$10 million per engineer.
11 (<https://www.recode.net/2016/9/17/12943214/sebastian-thrun-self-driving-talent-pool>).

12 With respect to development expenses, it is possible that Defendants would not have had
13 to incur all of the development expenses Waymo incurred if Defendants had developed the trade
14 secrets themselves (rather than misappropriating them from Waymo). Although Waymo is still
15 seeking discovery on how long Uber spent in its autonomous vehicle development efforts before
16 acquiring Otto, Waymo understands that Uber had been developing autonomous vehicle
17 technology prior to its discussions with Otto. Uber may argue that in calculating Uber’s unjust
18 enrichment based on Waymo’s development expenses, it may be appropriate to include only a
19 portion of Waymo’s total development expenses. To date, Defendants have not produced
20 evidence regarding their LiDAR development efforts necessary to conduct such an apportionment.
21 However, as discussed above, Uber believed that it could save development expenses by acquiring
22 Otto. Specifically, Uber estimated that the acquisition would speed up its autonomous vehicle
23 timeline by one to two years, and would speed up its laser development by two to four years.
24 Thus, one estimate of the potential savings as a result of Defendants obtaining Waymo’s
25 technology is the one to two years of average development expense that Uber estimated it would
26 save in developing autonomous vehicle technology, which can be expressed as a percentage of
27 Uber’s total development expenses. Another measure of the potential savings as a result of
28 Defendants obtaining Waymo’s technology is the difference between the amount of money

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1 Waymo has spent in developing autonomous vehicle technology and the amount of money that
2 Defendants have spent. Another measure of the potential savings can be calculated based on the
3 proportion of development expenses that Waymo has spent in developing LiDAR technology in
4 relation to the other technologies in autonomous vehicles. Waymo reserves its right to
5 supplement this response if and when Defendants produce the information necessary to conduct an
6 apportionment regarding development expenses.

7 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
8 for its entire ridesharing business would likely drop substantially, in part because it would not
9 have to share any revenue with its drivers.

10 Waymo is under a Court order to narrow its list of asserted trade secrets to less than ten by
11 August 1. After Waymo completes this narrowing, Waymo will consider how to apportion the
12 value of the trade secrets that Mr. Levandowski and Defendants misappropriated to account for the
13 trade secrets that it will bring to trial in this case. However, Waymo suspects that a substantial
14 portion of the unjust enrichment would be attributable to the most valuable trade secrets. Since
15 Uber and Waymo are racing to commercialize autonomous vehicles, accelerating the development
16 timeline was important to Uber. (UBER00070108-110 at ‘108.). Thus, Waymo presumes that
17 Defendants made use of the most important and most valuable trade secrets first.

Reasonable Royalty Damages

18 If the Court were to determine that damages based on the unjust enrichment caused by
19 Defendants’ misappropriation of the trade secrets is not provable, the Court “may order payment
20 of a reasonable royalty for no longer than the period of time the use could have been prohibited”
21 pursuant to the provisions of the California Uniform Trade Secrets Act. Cal. Civ. P. § 3426.3(b).
22 A reasonable royalty is also available under the Defend Against Trade Secrets Act. 18 U.S.C. §
23 1836(b)(3)(A)(iii) (“in lieu of damages measured by any other methods, the damages caused by
24 the misappropriation measured by imposition of liability for a reasonable royalty for the
25 misappropriator’s unauthorized disclosure or use of the trade secret”).
26

27 Waymo’s damages expert will analyze and compute the amount of reasonable royalty
28 damages payable to Waymo by Defendants due to the misappropriation of the trade secrets based

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1 on the documents and information produced by Waymo, Defendants and third parties during
2 discovery, as well as independent research conducted by Waymo’s damages expert. Specifically,
3 Waymo’s expert will, among other things, opine as to the appropriate reasonable royalty, either in
4 the form of a lump sum payment or a running royalty rate, or a combination of both.

5 As discussed above, Defendants have not yet responded to Waymo’s damages-related
6 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
7 to do so until the time that expert reports are due on August 24, 2017.

8 At present, Waymo anticipates that its expert’s computations of a reasonable royalty
9 adequate to compensate for Defendants’ infringement will involve an analytical approach and/or a
10 hypothetical negotiation approach. An analytical approach is used to determine a royalty that
11 leaves the infringer with a “normal” rate of return for the use of its products embodying the trade
12 secrets or to calculate a royalty based on the increased profitability due to the use of the trade
13 secrets in Defendants’ products. In other words, an analytical approach will determine, or isolate,
14 the financial benefit or value that Defendants obtained through their misappropriation of trade
15 secrets.

16 Waymo anticipates that its expert’s determination of reasonable royalty damages under an
17 analytical approach or a hypothetical negotiation approach will be based on, among other things,
18 analysis of sales and profit projections, analyst forecasts, profitability information and other
19 documents and records produced by Waymo, Defendants, and third parties. In addition to the
20 foregoing, Waymo’s expert may utilize documents and materials referred to and recognized as
21 relevant to the determination of the cost savings achieved by the Defendants due to their
22 misappropriation. In addition to the foregoing, Waymo’s expert may utilize documents and
23 materials referred to and recognized as relevant to the determination of a reasonable royalty or
24 other damages computations in cases such as *Georgia-Pacific*, among others.

25 At present, Waymo’s understanding of the primary considerations that Waymo’s expert
26 will analyze with respect to the hypothetical negotiation approach are summarized below.

27 *Impact on Waymo’s future expected profits* - Waymo expects that its future success is
28 critically dependent on its technological lead in autonomous vehicles. (WAYMO-UBER-

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00004108-131 at ‘109, ‘111; Chu Tr. 12:3-7, 45:19-24) Defendants’ misappropriation of Waymo’s trade secrets shortens the technological lead that Waymo has in autonomous vehicles. For example, when considering the acquisition of Ottomotto and Otto Trucking, Uber estimated that Otto’s technology could shorten its autonomous vehicle timeline by one to two years. (UBER00069030-033 at ‘033.) Moreover, if Uber does not exercise its Call Option with respect to Otto Trucking, yet another Waymo competitor will have had the benefit of Waymo’s misappropriated trade secrets. Given the importance of Waymo’s technological lead, this would likely have a significant impact on its ability to earn profits.

Waymo’s policy to protect and maintain its trade secrets – Waymo has sought to protect its trade secrets and has not disclosed the trade secrets to third parties, and it has not licensed its trade secrets. Waymo takes robust measures to protect its LiDAR trade secrets. As a condition of employment, Waymo requires all employees to enter into written agreements to maintain the confidentiality of proprietary and trade secret information, and not to misuse such information. Waymo also enforces an employee code of conduct that explains employees’ strict obligations to maintain the secrecy of confidential information, and requires employee training in security procedures. Droz Decl. ¶ 30.

Waymo also takes reasonable measures to mark confidential and proprietary information, such as documents and other materials, with visible legends designating them as such when sharing them outside of Waymo, subject to NDAs or other confidentiality agreements. Disclosures to vendors are limited to the subject matter necessary for the vendor’s engagement and do not reveal the entirety of a given LiDAR system or design. Waymo employs reasonable efforts to secure physical facilities by restricting access and employing locks, cameras, guards, and other security measures. *Id.* ¶¶ 33-37; Janosko Decl. ¶ 22.

Waymo uses Subversion (SVN) — a revision control system — to store its electrical design information. All traffic (both ingress to and egress from) the SVN repository is encrypted. All traffic is authenticated against a list of authorized users before access to the repository is granted, and users do not share credentials — all accesses are unique to specific users. Access control lists are audited monthly and stale users are aggressively purged. The SVN server is

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1 password protected and accessible through specialized software. *Id.* ¶¶ 23-25. Additionally,
2 Waymo imposes network security measures and access policies that restrict the access and
3 dissemination of certain confidential and proprietary trade secret information to only teams that
4 are working on projects related to that information. For example, Google employees working on
5 projects with no relation to Waymo or self-driving cars could not (and cannot) access Waymo’s
6 confidential and proprietary schematics. They are distributed on a “need to know” basis. Droz
7 Decl. ¶ 32. Google’s networks generally are also secured through Network Access Control
8 (“NAC”) procedures, Access Control Lists (“ACLs”), and restricted access privileges. Janosko
9 Decl. ¶¶ 13-16.

10 Google employs a variety of security mechanisms to prevent network intruders or attackers
11 who may compromise Waymo’s trade secret information. Google also secures employees’ devices
12 and credentials against attacks through monitoring and logging practices, as well as regular
13 security updates. *Id.* ¶¶ 7-12, 20.

14 Google secures its production infrastructure in progressive layers starting from the physical
15 security of data centers, continuing on to the security of the hardware and software that underlie
16 the infrastructure, and finally, the technical constraints and processes in place to support
17 operational security. Google employs many hundreds of engineers dedicated to security and
18 privacy distributed across all of Google, including many who are recognized industry authorities.
19 These engineers work to protect Google’s production servers from malware utilizing tools such as
20 binary verification. Google also has an incident management process for security events that may
21 affect the confidentiality, integrity, or availability of systems or data *Id.* ¶¶ 17-21.

22 Waymo incorporates by reference its Response to Interrogatory No. 7 and all supplements
23 thereto.

24 *Competitive relationship between Waymo and Uber and Otto Trucking –* Waymo
25 recognizes that Uber is the most significant competitor in the transportation as a service (TaaS)
26 business. (WAYMO-UBER-00004175-194 at ‘184-185) Similarly, Uber recognizes Waymo is a
27 significant competitor. In fact, as discussed above, Uber has described Waymo as an existential
28 threat to its TAAS business: “This war for self-driving is truly existential for Uber: we’ll either

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1 start up our second S curve of growth or we’ll die.” (UBER00070108-110 at ‘108.) Internal Uber
2 documents indicate that Uber believes it is in intense competition with Waymo: Discussing the
3 competition with Google, Mr. Holden discusses the battle and the war: “The *battle* is about what
4 we need to do to get ourselves into a sufficiently competitive position before December that G
5 doesn’t walk away with the crown for future of ride sharing. It’s about establishing beach heads,
6 being in the game in a credible way. The *war* is the long-term defeat of G and others so we
7 afford ourselves the opportunity to extend our massive scale business into the future. This will be
8 about who gets NSD self-driving to scale first.” (UBER00070108-110 at ‘108.) If Uber does not
9 exercise its Call Option with respect to Otto Trucking, Waymo will be facing two competitors
10 who have had the benefit of Waymo’s trade secrets.

11 *Development cost savings to Uber* – As discussed in more detail above, Uber has likely
12 realized significant cost savings in terms of its development timeline. While considering the
13 acquisition of Otto, Uber recognized one important benefit was that the acquisition “decreases
14 total investment in [Autonomous Vehicle] development.” (UBER00068983) An Uber email
15 estimates that Uber’s acquisition of Otto saved Uber at least a year in the race to large scale
16 autonomous vehicle deployment, and describes Uber’s next best choice as building the team
17 internally with a two to four year lag versus what the Otto team would bring. (UBER00060147-
18 156 at ‘147.) One way to measure the costs that Defendants saved through their misappropriation
19 of Waymo’s trade secrets is by looking at the costs that Waymo incurred to develop those trade
20 secrets. As discussed in Waymo’s response to interrogatory 6, Waymo has incurred up to \$1.1
21 billion to develop the trade secrets. (See Waymo’s 7/13 Supplemental Response to Interrogatory
22 No. 6 and all supplements thereto.)

23 *Increased future expected profits to Uber and/or Otto Trucking* – As discussed above in
24 the unjust enrichment section, Uber expected that acquiring Ottomotto and Otto Trucking would
25 accelerate the development of its LiDAR technology, and under its “most conservative case,”
26 Uber estimated the increased present value of incremental profit would be between \$836 million
27 and \$1.69 billion. (UBER00069030-033 at ‘033.)

28

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1 *LiDAR system cost savings* – Waymo has obtained significant cost savings by developing
2 custom, in-house LiDAR systems using its trade secrets, and Waymo expects that by
3 misappropriating Waymo’s trade secrets, Defendants will be able to obtain similar results.
4 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
5 as explained in more detail above and in Waymo’s response to Interrogatory No. 6, a mid-range
6 LiDAR from Velodyne costs approximately \$70,000. By contrast, the materials needed for
7 Waymo’s own mid-range GBr3 LiDAR system, which uses the trade secrets at issue in this case,
8 cost just over \$5,000. (*See* Waymo’s Response to Interrogatory No. 6 and all supplements
9 thereto.) Uber has also recently purchased third-party LiDAR units from [REDACTED]
10 each. (UBER00086529.)

11 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
12 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
13 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
14 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
15 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
16 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
17 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-
18 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
19 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
20 systems in 2018.

21 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
22 for its ridesharing business would likely drop substantially, in part because it would not have to
23 share any revenue with its drivers.

24 *Valuation of Uber’s acquisition* – As discussed above, Waymo is still obtaining discovery
25 regarding Uber’s internal valuation of Otto. However, Nina Qi testified that the Board was told
26 the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-103.)
27
28

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1 ***Unjust Enrichment / Reasonable Royalty Related To Otto Trucking's Use Of Waymo's***
 2 ***Trade Secrets (Separate From Its Acquisition And Disclosure Of Those Trade Secrets To***
 3 ***Ottomotto and Uber)***

4 Otto Trucking is also separately liable for damages with respect to its own use of Waymo’s
 5 trade secrets, including through its subsidiary Otto Transport, which currently operates trucks for
 6 the benefit of Uber’s freight program. (OTTOTRUCKING00002750.) Discovery is ongoing
 7 regarding the use of Waymo's trade secrets by Otto Trucking and its subsidiaries pending the
 8 completion of the acquisition by Uber. Waymo’s technical expert is continuing to assess
 9 Defendants’ use of Waymo’s trade secrets; such assessments will ultimately inform the damages
 10 analysis in this case. Moreover, Defendants have not yet responded to Waymo’s damages-related
 11 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
 12 to do so until the time that expert reports are due on August 24, 2017.

13 ***Punitive Damages, Attorneys Costs and Fees –***

14 Defendants’ trade secret misappropriation has been willful and malicious. If willful and
 15 malicious trade secret misappropriation exists, both CUTSA and DTSA allow punitive damages
 16 up to two times any damages award. *See* Cal. Civil Code Section § 3426.3 *and* 18 U.S.C. §
 17 1836(b)(3)(C). If willful and malicious misappropriation exists, CUTSA and DTSA also allow
 18 recovery of attorneys’ fees and costs. *See* § 3426.4 *and* 18 U.S.C. § 1836(b)(3)(D). In addition to
 19 attorneys’ fees, Waymo is also eligible to receive reasonable expert fees under CUTSA. § 3426.4.

20 While discovery is not complete and Waymo has still not seen the Stroz due diligence
 21 report (which Waymo expects will bear on this issue), the evidence to date indicates that Uber and
 22 Anthony Levandowski were in league with one another to port Waymo’s trade secrets to Uber
 23 going as far back as May 2015. (Dkt. 712, Ex. 1 (logging discussions between Uber and Mr.
 24 Levandowski beginning on May 20, 2015 “wherein Anthony Levandowski mentioned LiDAR to
 25 any officer, director, employee, agent, supplier, or consultant of defendants”).) Uber continued to
 26 meet with Mr. Levandowski throughout the fall of 2015. (Dkt. 712, Ex. 1 (logging five meetings
 27 with Mr. Levandowski regarding LiDAR between October 2015 and December 11, 2015).) Uber
 28 met with Mr. Levandowski to discuss LiDAR on the very same day that he downloaded 14,000

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1 proprietary files from Waymo servers, (Dkt. 712 Ex. 1; Dkt. 23, ¶ 44), and again a few weeks later
2 on the same day Mr. Levandowski downloaded additional proprietary information from Waymo.
3 (Ex. 263; Dkt. 24-2 ¶ 22.)

4 When Uber began meeting with Otto, Otto did not have any products. (Qi Tr. 146:8-18.)
5 Instead, Uber acquired Mr. Levandowski’s company because of its “[e]xperience w/ automotive
6 efforts of competitors”:

7 Anthony and his close team have developed several generations of mid and long
8 range laser that we now believe is critical to AV autonomy (day and night). Not
9 only do they have the several generations of experience but also know how to
10 improve on the next gen devices that they would build for us. We have yet to find
11 anyone else in the world with this know-how. . . . Second, just rubbing shoulders
12 with this team and having them advise us all over AV has a decent chance of
saving Uber at least a year off of the race to large scale AV deployment. . . . My
point is that there is more value here (considerable) than 25 disparate engineers that
we would pick up from 25 different places. This is a team that knows each other
knows the tech, knows the potholes and can jam at incredible rate (we hope) to help
solve some of our most pressing challenges.

13 (Ex. 271 at 1.) While Mr. Bares refers to the “team” that Mr. Levandowski was going to bring to
14 his new company, there was no team in place other than Mr. Levandowski and Mr. Ron at the time
15 of this email.

16 Given Uber’s scheme to buy Waymo’s “tech” and “know how” through Mr. Levandowski
17 (and the corporate entities Ottomotto and Otto Trucking), Uber began anticipating litigation with
18 Waymo almost immediately. The day after Mr. Levandowski resigned from Waymo, Uber was
19 already discussing indemnity with Mr. Levandowski and Lior Ron. (Ex. 277, January 28, 2016
20 email from Cameron Poetzsch asking Travis Kalanick, “[d]id you tell Anthony that you would
21 indemnify them if they get sued by G as part of or after the deal? They’re under that impression.”)
22 By February 5, 2016, the parties were specifically discussing indemnity for “Bad Acts,” *including*
23 “downloading of files of [Google].” (UBER00017265 at -73, Email between Uber representatives
24 and Lior Ron discussing “Timing of Indemnity / Closing Conditions,” and an “Example list of
25 Specified Bad Acts,” which included “downloading of files of [Google]”).

26 Having agreed to indemnify Mr. Levandowski for “downloading of files of [Google]” and
27 having agreed to indemnify Ottomotto and Otto Trucking for Bad Acts including trade secret
28 misappropriation, Uber then set up a forensic due diligence investigation designed specifically to

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1 uncover – or confirm – the downloaded Waymo files in Otto’s or Mr. Levandowski’s possession.
2 The existence and sheer scope of this investigation is proof enough that Uber knew Mr.
3 Levandowski had Waymo materials: it was, and remains, a process that was unprecedented for
4 Uber. (Poetzsch Tr. at 128:11-25; Qi Rough Tr. at 243:17-244:3.) As part of the investigation,
5 Stroz took and analyzed the electronic devices of five different Otto employees, including both
6 their personal and work devices. (See Ron Tr. at 96:3-19.) Despite this, the Uber witnesses
7 responsible for overseeing the investigation testified that the diligenced employees did not seem
8 upset by the scope of the investigation that Uber requested; instead, they were “okay with it.” (Qi
9 Rough Tr. at 223:22-224:6.) The most likely explanation for that is, of course, that all parties
10 already knew what Uber was looking for—stolen Waymo files.

11 Although Uber must have known about the downloaded files when it agreed to indemnify
12 Mr. Levandowski and set up the forensic investigation, Uber almost certainly found out that Mr.
13 Mr. Levandowski had downloaded materials when the diligence process got underway. To
14 motivate Mr. Levandowski to disclose *all* of his “Bad Acts” to Stroz, Uber created an elaborate
15 incentive structure: as long as Mr. Levandowski disclosed his “Bad Acts” (including
16 “downloading of files of [Google]”) to Stroz, Uber would indemnify him. (UBER00017265 at -
17 73-74; Dkt. 566 at 3.) If Mr. Levandowski did not disclose “Bad Acts” to Stroz, Levandowski
18 could not seek indemnification from Uber for those “Bad Acts” later. (*Id.*) Although Waymo has
19 still not seen the due diligence report that Stroz produced, all evidence indicates that Mr.
20 Levandowski accepted this offer and disclosed the existence of the stolen information to Uber and
21 Stroz. Defendants have never disputed that Stroz has some of the stolen information in its
22 possession as a result of the due diligence process, and Uber recently admitted that its lawyers
23 have also possessed the stolen information for over a year by virtue of their involvement in the due
24 diligence process. (Dkt. 677-8.)

25 *At the very latest*, Uber learned that Mr. Levandowski had downloaded Waymo materials
26 in his possession on March 11, 2016 when Mr. Levandowski told Uber outright. As Uber has
27 explained: “On or about March 11, 2016, Mr. Levandowski reported to [Travis] Kalanick, Nina Qi
28 and Cameron Poetzsch at Uber as well as Lior Ron that he had identified five discs in his

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1 possession containing Google information.” (Dkt. 695 at 4.) Uber’s accounting indicates that Mr.
2 Levandowski and Mr. Kalanick had a meeting to discuss LIDAR on the same day. (Dkt. 712, Ex.
3 1 at No. 63.) Since receiving this interrogatory response, Waymo has deposed three of the four
4 individuals to whom Mr. Levandowski made this admission, and all three confirmed that Mr.
5 Levandowski did indeed reveal that he had Google “stuff” in his possession during an in-person
6 meeting with Uber on March 11, 2016. (Ron Tr., 25:23-26:18; Poetzscher Tr., 249:3-250:9; Qi
7 Rough Tr., 271:11-273:20.) Uber now insists that Mr. Levandowski subsequently destroyed the
8 materials (raising other serious concerns, including concerns regarding the integrity of Stroz’s
9 investigation), but the point remains: Uber was aware of Mr. Levandowski taking confidential
10 Waymo information files as of March 11, 2016, and Uber acquired Mr. Levandowski’s company
11 anyway. And even after finding out that he had Waymo materials in his possession on March 11,
12 2016, Uber *never* took *any* steps to prohibit Mr. Levandowski from using his “treasure trove of
13 files” in his work at Uber.

14 Waymo also seeks prejudgment interest on the damages awarded for the misappropriation
15 of trade secrets at the California statutory prejudgment interest rate of seven percent (7%).
16

17 INTERROGATORY NO. 11:

18 Identify all facts supporting your contention that Waymo owns each of the alleged trade
19 secrets identified in Waymo’s 2019 Disclosure.
20

21 RESPONSE TO INTERROGATORY NO. 11:

22 Waymo incorporates by reference its General Objections. Waymo further objects to this
23 interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including to
24 the extent that it asks Waymo to “identify all facts.” Waymo further objects to this request to the
25 extent it is compound, complex, and contains multiple subparts.

26 Subject to and without waiving the foregoing General and Specific Objections, Waymo
27 responds as follows:
28

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1 DATED: July 25, 2017

QUINN EMANUEL URQUHART & SULLIVAN,
LLP

2
3 By /s/ Charles K. Verhoeven

4 Charles K. Verhoeven
Attorneys for WAYMO LLC

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EXHIBIT 1

***UNREDACTED VERSION
OF DOCUMENT(S)
SOUGHT TO BE SEALED***

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11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 WAYMO LLC

14 Plaintiffs,

15 v.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO, LLC; OTTO TRUCKING
18 LLC,

19 Defendants.

Case No. 17-cv-00939-JCS

**PLAINTIFF’S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
OTTO TRUCKING, LLC’S FIRST SET OF
INTERROGATORIES (NOS. 1-14)**

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1 INTERROGATORY NO. 10:

2 Identify all damage, including a specific calculation of monetary damages, caused by any
3 alleged misappropriation of trade secrets by Otto Trucking.
4

5 RESPONSE TO INTERROGATORY NO. 10:

6 Waymo incorporates by reference its General Objections. Waymo further objects to this
7 interrogatory on the grounds that it is vague and ambiguous, including with respect to the phrase
8 “all damage.” Waymo further objects to this request to the extent it is compound, complex, and
9 contains multiple subparts. Waymo further objects to this interrogatory as premature to the extent
10 it calls for information that is subject to expert testimony. Waymo will provide expert testimony
11 in accordance with the Court’s procedural schedule.

12 Subject to and without waiving the foregoing General and Specific Objections, Waymo
13 responds as follows:

14 Waymo believes it has suffered and is suffering irreparable harm as a result of Otto
15 Trucking’s trade secret misappropriation. In addition, Waymo believes it is entitled to damages
16 for Otto Trucking’s trade secret misappropriation, particularly to the extent Otto Trucking has
17 used Waymo’s trade secrets to fast-track LiDAR development for its own benefit or for the benefit
18 of Ottomotto or Uber. Waymo is continuing its discovery into the nature and extent of Otto
19 Trucking’s use of Waymo’s trade secrets for its benefit, for the benefit of Ottomotto, and/or for the
20 benefit of Uber. Waymo is also continuing its discovery into the role of Otto Trucking vis-à-vis
21 Ottomotto and Uber as a conduit of misappropriated information from Mr. Levandowski and
22 Ottomotto/Uber. A specific calculation of monetary damages caused by Otto Trucking’s
23 misappropriation cannot be provided until this discovery is more substantially complete.

24 Waymo expects to calculate past damages based on lost profits, unjust enrichment, and
25 reasonable royalty metrics. To the extent an injunction is not granted, Waymo will also seek
26 damages, based on these same metrics, tied to any continuing use of Waymo’s trade secrets.

27 Inputs to Waymo’s damages analysis vis-à-vis Otto Trucking include, for example: the
28 extent, duration, and purpose of trade secret misappropriation; estimates of future profits and cash

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1 flows to be earned by Otto Trucking (or those benefiting from its trade secret misappropriation)
2 and Waymo; assessments and projections regarding the relevant markets, competition therein, and
3 the relevant parties’ competitive positions; investment in LiDAR technology (in time, capital,
4 engineering costs, and other expenditures); and valuations of the relevant technology. Discovery
5 on these subjects is ongoing.

6 Waymo further seeks a judgment that this case is exceptional and an award of Waymo’s
7 costs and reasonable attorneys’ fees. Waymo also seeks an accounting of all sales and revenues,
8 together with pre-judgment and post-judgment interest. Waymo further seeks enhanced damages
9 for Defendants’ willful and malicious conduct in misappropriating Waymo’s trade secrets,
10 punitive damages, and other relief including but not limited to disgorgement of profits from unjust
11 enrichment. Waymo seeks any other relief available under applicable law. It would be premature
12 to estimate the amount of damages at this time.

13 Discovery is ongoing and Waymo reserves the right to supplement – and anticipates
14 regularly supplementing – this response after further discovery and investigation into Otto
15 Trucking’s misappropriation of Waymo’s trade secrets and the benefits obtained by Defendants as
16 a result of that misappropriation.

17
18 FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:

19 Waymo objects to this interrogatory on the grounds that it is vague and ambiguous,
20 including with respect to the phrase “all damage.” Waymo further objects to this interrogatory to
21 the extent it is compound, complex, and contains multiple subparts. Waymo further objects to this
22 interrogatory as premature to the extent it calls for information that is subject to expert testimony.
23 Waymo will provide expert testimony in accordance with the Court’s procedural schedule.

24 Subject to and without waiving the foregoing objections, Waymo responds as follows:

25 Waymo’s technical expert is continuing to assess Defendants’ use of Waymo’s trade
26 secrets; such assessments will ultimately inform the damages analysis in this case. Moreover,
27 Defendants have not yet responded to Waymo’s damages-related discovery requests. Therefore,
28

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1 Waymo’s expert has not concluded his analysis and is not expected to do so until the time that
2 expert reports are due on August 24, 2017.

3 Discovery in this case is ongoing, and Waymo is still waiting for substantive responses to
4 its Fourth Set of Requests for Production (Nos. 266-297) and First Set of Common and Specific
5 Interrogatories, all of which relate to damages. Specifically, Waymo expects Defendants’
6 responses to the following document requests and interrogatories to inform its response to this
7 interrogatory, and Waymo expects to supplement its response to this interrogatory when it
8 receives Defendants’ document production and interrogatory responses:

- 9 • DOCUMENTS sufficient to show UBER’s market capitalization and internal
10 valuation of itself on a quarterly basis, from the year prior to the year in which
11 UBER first contemplated developing autonomous vehicles through the present.
- 12 • DOCUMENTS sufficient to show the impact of developing autonomous vehicles
13 on Uber’s internal valuation of itself from the year prior to the year in which UBER
14 first contemplated developing autonomous vehicles through the present.
- 15 • DOCUMENTS describing UBER’s development of autonomous vehicles as
16 necessary to the continued viability of UBER or to the continued viability of any
17 aspect of UBER’s business, INCLUDING but not limited to characterizations of a
18 competitor’s development or deployment of autonomous vehicles as an existential
19 threat to UBER.
- 20 • DOCUMENTS sufficient to show each iteration of DEFENDANTS’ plan to launch
21 any autonomous vehicles in any geographic region from the time DEFENDANTS
22 first contemplated developing or deploying autonomous vehicles to the present.
- 23 • DOCUMENTS sufficient to show DEFENDANTS’ estimates of the size of the
24 ridesharing market and DEFENDANTS’ share of that market in the United States
25 for each of the last six years on a quarterly basis. To the extent DEFENDANTS
26 break out such estimates by geography (region, city, etc.), those estimates should
27 also be provided.
- 28 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts of the size of the
ride-sharing market, the percentage of the ride-sharing market that will be serviced
by autonomous vehicles, and DEFENDANTS’ share of that market in the United
States (by autonomous vehicles and vehicles driven by contractors) for any period
of time forecasted by UBER, on a quarterly basis. To the extent DEFENDANTS
break out such estimates by geography (country, region, city, etc.), those estimates
should also be provided. To the extent DEFENDANTS create different forecasts
based on different assumptions, documents REGARDING each forecast – with
documents sufficient to show the assumptions for each – should be provided.

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- 1 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts REGARDING the
2 number of DEFENDANTS’ ride-sharing vehicles in the United States (by
3 autonomous vehicles and vehicles driven by contractors), for any period of time
4 forecasted by UBER —broken out by on a quarterly basis. To the extent
5 DEFENDANTS break out such estimates by geography (country, region, city, etc.),
6 those estimates should also be provided. To the extent DEFENDANTS create
7 different forecasts based on different assumptions, documents REGARDING each
8 forecast – with documents sufficient to show the assumptions for each – should be
9 provided.
- 10 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
11 operating plans, marketing plans, financial plans, sales plans, and investment plans
12 for its ridesharing business, INCLUDING projections for revenue generation and
13 profitability.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
15 operating plans, marketing plans, financial plans, sales plans, and investment plans
16 for its autonomous vehicle program, INCLUDING projections for revenue
17 generation and profitability of the autonomous vehicle program.
- 18 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of any barriers to
19 entry in the ride-sharing market and the status of any attempts by DEFENDANTS
20 to enforce such barriers against competitors INCLUDING WAYMO, INCLUDING
21 investments and infrastructure needed.
- 22 • DOCUMENTS REGARDING DEFENDANTS’ discussion of WAYMO or its
23 business, INCLUDING DEFENDANTS’ analysis of WAYMO’s impact or
24 potential impact on the ridesharing market or on UBER.
- 25 • DOCUMENTS sufficient to identify the date that UBER first considered deploying
26 autonomous vehicles.
- 27 • DOCUMENTS sufficient to identify the date that UBER first considered
28 developing its own autonomous vehicles.
- DOCUMENTS sufficient to identify the date that UBER first considered
developing its own in-house LiDAR.
- DOCUMENTS REGARDING the importance of a first-mover advantage in
commercializing autonomous vehicles, INCLUDING any estimates of the market
shares of other entrants that are not first to market.
- DOCUMENTS REGARDING the importance of LiDAR, INCLUDING the
importance of low-cost LiDAR, to DEFENDANTS’ ability to compete.

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- 1 • DOCUMENTS REGARDING the relative value of safety (vis-à-vis, for example,
2 cost and timing of entry into relevant markets) in the commercialization of
3 autonomous vehicles.
- 4 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of WAYMO’s
5 technological lead REGARDING autonomous vehicle technology (INCLUDING
6 DEFENDANTS’ estimates of the time, personnel, and investment needed to close
7 the gap between DEFENDANTS and WAYMO), and documents sufficient to show
8 how DEFENDANTS’ analysis or estimates have changed over time.
- 9 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
10 technological lead over DEFENDANTS REGARDING autonomous vehicle
11 technology (INCLUDING DEFENDANTS’ estimates of the time, personnel, and
12 investment needed to close the gap between DEFENDANTS and WAYMO)
13 changed after Uber’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
15 technological lead over DEFENDANTS REGARDING LiDAR technology (INCLUDING
16 DEFENDANTS’ estimates of the time, personnel, and investment
17 needed to close the gap between DEFENDANTS and WAYMO) changed after
18 UBER’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 19 • DOCUMENTS sufficient to show DEFENDANTS’ comparisons of the cost and
20 profitability of a human-driven versus an autonomous vehicle in a ride-sharing
21 fleet.
- 22 • DOCUMENTS sufficient to show the historical and current cost of
23 DEFENDANTS’ autonomous vehicles, broken down by component, and dating
24 back to the inception of DEFENDANTS’ autonomous vehicle program. As noted
25 in the Instructions above, to the extent DEFENDANTS can provide separate
26 information for each Defendant, DEFENDANTS should do so.
- 27 • DOCUMENTS sufficient to show DEFENDANTS’ total financial investment
28 including but not limited to employee time, purchase of capital equipment, and
outside consultants, by quarter, into its efforts to develop in-house LiDAR. As
noted in the Instructions above, to the extent DEFENDANTS can provide separate
information for each Defendant, DEFENDANTS should do so.
- DOCUMENTS sufficient to show DEFENDANTS’ investment, in terms of time
including but not limited to engineers, software developers, managers, and
executives (broken out by each category of employee), into its efforts to develop in-
house LiDAR. As noted in the Instructions above, to the extent DEFENDANTS

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1 can provide separate information for each Defendant, DEFENDANTS should do
2 so.

- 3 • Patent licenses or agreements relating to LiDAR.
- 4 • DOCUMENTS sufficient to show the impact to DEFENDANTS of having to
5 redesign Fuji to avoid using the trade secrets identified in response to UBER’s
6 interrogatory No. 1.
- 7 • DOCUMENTS sufficient to show any valuation (whether conducted by UBER or
8 by a third party) of the assets and technology acquired in the acquisition of Otto by
9 Uber, INCLUDING valuations performed for the purpose of purchase price
10 accounting or any other purpose.
- 11 • DOCUMENTS sufficient to show any DEFENDANTS’ projected revenue, gross
12 margin, and operating profit for any division including autonomous vehicles.
- 13 • DOCUMENTS sufficient to show any the financials, INCLUDING profit and loss
14 statements and balance sheet, for OTTOMOTTO, OTTO TRUCKING, and any
15 division of UBER including autonomous vehicles.
- 16 • DOCUMENTS sufficient to show DEFENDANTS’ approved requests for capital
17 expenditure authorizations related to its autonomous vehicle program,
18 INCLUDING R&D expenditures, technology/equipment acquisitions, and
19 marketing expenditures.
- 20 • Describe in detail the impact, including financial impact, to DEFENDANTS of
21 having to redesign Fuji to avoid using the trade secrets identified in response to
22 UBER’s Interrogatory No. 1.
- 23 • To the extent DEFENDANTS contend they will be irreparably harmed by a
24 permanent injunction prohibiting the use of WAYMO’s trade secrets in this case,
25 describe in detail the factual and legal bases for that contention.
- 26 • Describe in detail DEFENDANTS’ investment in developing in-house LiDAR.
27 This should include DEFENDANTS’ financial investment, as well as
28 DEFENDANTS’ investment in terms of time and personnel.
- Describe in detail [OTTOMOTTO and OTTO TRUCKING’s] efforts to place a
value on OTTOMOTTO and/or OTTO TRUCKING or their respective assets and
technology as part of UBER’S acquisition of OTTOMOTTO and/or OTTO
TRUCKING, either prior to or following the acquisition.
- Describe in detail UBER’s efforts to place a value on OTTOMOTTO and/or OTTO
TRUCKING or their respective assets and technology as part of the acquisition,
either prior to or following the acquisition, including but not limited to the efforts
described by Nina Qi during her deposition at Rough Tr. 192:4-199:15.

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- IDENTIFY the date that UBER first considered developing its own in-house LiDAR and the date UBER began developing its own in-house LiDAR (to the extent it differs from the date UBER began considering it), and describe in detail UBER’s reasons for wanting to develop its own in-house LiDAR.

Damages for Violations of Defense of Trade Secrets Act and California Uniform Trade Secret Act

Uber, Ottomotto, and Otto Trucking are jointly and severally liable for damages in this case. Ottomotto and Otto Trucking are the corporate vehicles for the misappropriation of Waymo’s trade secrets for the benefit of Uber. Anthony Levandowski officially formed Ottomotto on January 15, 2016 (while he was simultaneously employed by Waymo, consulting with Uber on Uber's self-driving car project, and negotiating the acquisition of Ottomotto). He officially formed Otto Trucking on February 1, 2016 (five days after resigning from Waymo and while he was consulting with Uber on Uber's self-driving car project and negotiating the acquisition of Otto Trucking). Mr. Levandowski was acting for all three Defendants at various times in order to facilitate the misappropriation of Waymo's trade secrets.

Uber entered into Agreements and Plans of Merger with each of Ottomotto and Otto Trucking on the same date, within weeks of the formation of those entities. (UBER00016757; UBER00016453). Pursuant to its Agreement and Plan of Merger, Otto Trucking was obligated and continues to be obligated to assign all of its intellectual property to Ottomotto (which has now been acquired by Uber). (UBER00016757.) Pending completion of the Otto Trucking acquisition by Uber, Anthony Levandowski remains one of two managing members of Otto Trucking and holds [REDACTED]. (OTTOTRUCKING00000004.) Uber has an exclusive option to acquire Otto Trucking between August 31, 2017 and November 30, 2017. (UBER00016757 at -764, -819.) If Uber does not acquire Otto Trucking during that period, Uber will be obligated to (i) become a 50% owner in Otto Trucking and (ii) to license Uber's self-driving technology (including all trade secrets) exclusively to Otto Trucking (even vis-à-vis Uber) for use in the commercialization of self-driving trucks. (UBER00016757 at -772.)

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1 Otto Trucking is jointly and severally liable for all damages caused by Defendants'
2 misappropriation of Waymo's trade secrets, including Defendants' unjust enrichment resulting
3 from Defendants' misappropriation, any reasonable royalty assessed as a result of Defendants'
4 misappropriation, and any exemplary damages, attorneys' fees, expert fees, and costs awarded as a
5 result of Defendants' misappropriation.

6 ***Unjust Enrichment Damages***

7 Uber, Ottomotto, and Otto Trucking have been unjustly enriched due to their
8 misappropriation of Waymo’s trade secrets. There are several measures that can be used to
9 quantify the unjust enrichment to Defendants. One measure of the unjust enrichment to
10 Defendants is the value that was paid (or will be paid) by Uber for Ottomotto and Otto Trucking
11 (collectively, “Otto”). When Uber began negotiating with Mr. Levandowski, Otto was a company
12 that did not exist, and did not have any products. (Qi Tr. 146:8-18.) And at that time, Uber was
13 aware that he still had confidential information from Waymo. (Bares Tr. at 179:14-18.) John
14 Bares, Operations Director in Uber’s Advanced Technology Group, was personally responsible for
15 negotiating aspects of Uber’s acquisition of Otto on Uber’s behalf, including a series of technical
16 milestones regarding LiDAR. He admitted that having access to Waymo’s specifications for
17 medium and long-range LiDAR would have been useful for someone trying to build medium and
18 long-range LiDAR at Uber because Waymo is “eight years ahead” and “had custom lasers.” (*Id.*
19 179:19-180:12.) Defendants do not dispute that Mr. Levandowski had access to Waymo’s files at
20 this time—as a result of both his ongoing employment at Waymo, and his illicit downloads.

21 Uber and Otto began negotiating the term sheet for the acquisition of Otto in January and
22 February 2016, with the final term sheet executed on February 22, 2016. (UBER00017518-578;
23 UBER00069043-064.) For at least some of this period, Mr. Levandowski was still an employee of
24 Google. Because Otto had no products when Uber and Otto began negotiating (Qi Tr. 146:8-18),
25 the only things of value to be acquired by Uber were likely (1) the engineers that Uber acquired;
26 and (2) Waymo’s technology. Therefore, the misappropriated trade secrets represented a
27 significant portion of the assets acquired by Uber, as well as the talents of the employees that
28 would be engaged in connection with the acquisition.

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1 Uber and Otto entered into the formal Agreement and Plan of Merger on April 11, 2016.
2 (UBER00016453-16523; UBER00016757.) Prior to entering into the agreement, Uber’s Board of
3 Directors approved the acquisition. Discovery regarding Uber’s internal valuation of Otto
4 (including information regarding the assumptions underlying Uber’s internal valuation of Otto)
5 will further inform Waymo’s unjust enrichment analysis. However, Nina Qi testified that Uber
6 told its Board that the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-
7 103.) Although Uber’s payment to Otto was conditioned on certain milestones that stretched for
8 some time into the future, this value is a reasonable measure of the present value of the transaction
9 given that it was the value presented to Uber’s Board of Directors in the Board’s consideration and
10 approval of the acquisition.

11 Another measure of the unjust enrichment to Defendants is the present value of the
12 additional cash flows that Defendants will earn as a result of Uber’s accelerated development of
13 self-driving car technology. Uber expected that acquiring Otto would accelerate the development
14 of its LiDAR technology. For example, when considering the acquisition, Uber estimated that
15 acquiring Otto could shorten its autonomous vehicle timeline by one to two years.
16 (UBER00069030-033 at ‘033.) Even under its “most conservative case,” Uber estimated the
17 increased present value of incremental profit (as measured by EBIT, or Earnings Before Interest
18 and Taxes) from Otto’s technology would be between \$836 million and \$1.69 billion.
19 (UBER00069030-033 at ‘033.) In addition to the increased profits, Uber recognized Waymo was
20 a threat to its entire existence, potentially placing its entire business at risk—something that,
21 according to public reports, is worth approximately \$70 billion. (See
22 [https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)
23 [industry-watchers/](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)). For example, Uber’s then-CEO was quoted as follows: “The minute it was
24 clear to us that our friends in Mountain View were going to be getting in the ride sharing space,
25 we needed to make sure there is an alternative [self-driving car]. Because if there is not, we’re not
26 going to have any business.” He also described developing an autonomous vehicle as “basically
27 existential for us.” (UBER0006042-047 at ‘043; UBER0006035-041 at ‘037; UBER00064472-
28 473; LEV_001940-051 at ‘940.) In messaging notes related to the acquisition, Uber’s then-CEO

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1 noted “Autonomous transportation is very possibly a winner-take-all, and thus existential for
2 Uber.” (UBER00064468-469 at ‘468.) Similarly, Jeff Holden, Uber’s Chief Product Officer,
3 wrote: “This war for self-driving is truly existential for Uber: we’ll either start up our second S
4 curve of growth or we’ll die. There might be in-between cases, but it’s definitely easy to see how
5 the extremes could play out.” Discussing the competition with Google, Mr. Holden discusses the
6 battle and the war: “The *battle* is about what we need to do to get ourselves into a sufficiently
7 competitive position before December that G doesn’t walk away with the crown for future of ride
8 sharing. It’s about establishing beach heads, being in the game in a credible way. The *war* is
9 the long-term defeat of G and others so we afford ourselves the opportunity to extend our massive
10 scale business into the future. This will be about who gets NSD self-driving to scale first.”
11 (UBER00070108-110 at ‘108.)

12 Another measure of unjust enrichment to Defendants is the expected cost savings to
13 Defendants from using Waymo’s trade secrets in Uber’s LiDAR systems. Waymo has obtained
14 significant cost savings by developing custom, in-house LiDAR systems using its trade secrets.
15 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
16 as explained in more detail in Waymo’s response to Interrogatory No. 6, a mid-range LiDAR from
17 Velodyne costs approximately \$70,000. Uber has also recently purchased third-party LiDAR
18 units from [REDACTED] (UBER00086529.) By contrast, the materials needed for
19 Waymo’s own mid-range GBR3 LiDAR system, which uses the trade secrets at issue in this case,
20 cost just over \$5,000. (See Waymo’s Response to Interrogatory No. 6 and all supplements
21 thereto.)

22 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
23 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
24 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
25 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
26 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
27 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
28 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-

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1 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
2 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
3 systems in 2018.

4 Another measure of unjust enrichment to Defendants is the expected cost savings due to
5 reduced development expenses from using Waymo’s trade secrets in Uber’s LiDAR systems.
6 While considering the acquisition of Otto, Uber recognized one important benefit was that the
7 acquisition “decreases total investment in [Autonomous Vehicle] development.”
8 (UBER00068983) An internal Uber email estimates that Uber’s acquisition of Otto saved Uber at
9 least a year in the race to large scale autonomous vehicle deployment, and describes Uber’s next
10 best choice as building the team internally with a two to four year lag versus what the Otto team
11 would bring. (UBER00060147-156 at ‘147.) One way to measure the costs that Defendants saved
12 through their misappropriation of Waymo’s trade secrets is by looking at the costs that Waymo
13 incurred to develop those trade secrets. As discussed in Waymo’s response to interrogatory 6,
14 Waymo has incurred up to \$1.1 billion to develop the trade secrets. (See Waymo’s 7/13
15 Supplemental Response to Interrogatory No. 6 and all supplements thereto.)

16 Waymo anticipates that Defendants will argue that the measures of unjust enrichment
17 discussed above are measures of value for the entirety of the company (Otto) acquired by Uber.
18 Waymo expects to rebut any evidence presented by Defendants that a portion of any value can be
19 attributed to any contributions other than Waymo’s trade secrets. Nonetheless, Waymo addresses
20 apportionment below.

21 Otto had no products when Uber and Otto began negotiating. (Qi Tr. 146:8-18.) And
22 Otto’s profit and loss statement for January through March 2016 reflects less than \$1.4 million of
23 expenses. (UBER00060164 and UBER00060165). Therefore, the only things of value to be
24 acquired by Uber were likely (1) the engineers that Uber acquired; and (2) Waymo’s technology.
25 Waymo is still conducting discovery regarding what assets (if any) Otto had when Uber decided to
26 acquire it. To the extent Otto had any working products or technology by the time Uber agreed to
27 acquire it, Waymo’s unjust enrichment analysis would account for that by deducting the value of
28 Otto’s then-existing technology. However, as previously discussed, Waymo expects the large

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1 majority of the measures of value discussed above to be attributable to the value of the stolen
2 information and engineers that Uber acquired in the transaction.

3 With respect to the value of the engineers Uber acquired from Otto, talented engineers in
4 the autonomous vehicle field are few and far between. In particular, some of the engineers who
5 left Waymo to join Otto, and who were eventually acquired by Uber, had very specialized skill
6 sets, including Don Burnette, Claire Delaunay, Gaetan Pennecot and Mr. Levandowski himself.
7 These engineers would likely be worth more than an average engineer, and more than even an
8 average autonomous vehicle engineer. Waymo is still obtaining discovery regarding Uber’s
9 valuation of the engineers that it acquired, but one public estimate of the value of engineers in the
10 autonomous vehicle industry is \$10 million per engineer.
11 (<https://www.recode.net/2016/9/17/12943214/sebastian-thrun-self-driving-talent-pool>).

12 With respect to development expenses, it is possible that Defendants would not have had
13 to incur all of the development expenses Waymo incurred if Defendants had developed the trade
14 secrets themselves (rather than misappropriating them from Waymo). Although Waymo is still
15 seeking discovery on how long Uber spent in its autonomous vehicle development efforts before
16 acquiring Otto, Waymo understands that Uber had been developing autonomous vehicle
17 technology prior to its discussions with Otto. Uber may argue that in calculating Uber’s unjust
18 enrichment based on Waymo’s development expenses, it may be appropriate to include only a
19 portion of Waymo’s total development expenses. To date, Defendants have not produced
20 evidence regarding their LiDAR development efforts necessary to conduct such an apportionment.
21 However, as discussed above, Uber believed that it could save development expenses by acquiring
22 Otto. Specifically, Uber estimated that the acquisition would speed up its autonomous vehicle
23 timeline by one to two years, and would speed up its laser development by two to four years.
24 Thus, one estimate of the potential savings as a result of Defendants obtaining Waymo’s
25 technology is the one to two years of average development expense that Uber estimated it would
26 save in developing autonomous vehicle technology, which can be expressed as a percentage of
27 Uber’s total development expenses. Another measure of the potential savings as a result of
28 Defendants obtaining Waymo’s technology is the difference between the amount of money

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1 Waymo has spent in developing autonomous vehicle technology and the amount of money that
2 Defendants have spent. Another measure of the potential savings can be calculated based on the
3 proportion of development expenses that Waymo has spent in developing LiDAR technology in
4 relation to the other technologies in autonomous vehicles. Waymo reserves its right to
5 supplement this response if and when Defendants produce the information necessary to conduct an
6 apportionment regarding development expenses.

7 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
8 for its entire ridesharing business would likely drop substantially, in part because it would not
9 have to share any revenue with its drivers.

10 Waymo is under a Court order to narrow its list of asserted trade secrets to less than ten by
11 August 1. After Waymo completes this narrowing, Waymo will consider how to apportion the
12 value of the trade secrets that Mr. Levandowski and Defendants misappropriated to account for the
13 trade secrets that it will bring to trial in this case. However, Waymo suspects that a substantial
14 portion of the unjust enrichment would be attributable to the most valuable trade secrets. Since
15 Uber and Waymo are racing to commercialize autonomous vehicles, accelerating the development
16 timeline was important to Uber. (UBER00070108-110 at ‘108.). Thus, Waymo presumes that
17 Defendants made use of the most important and most valuable trade secrets first.

Reasonable Royalty Damages

18
19 If the Court were to determine that damages based on the unjust enrichment caused by
20 Defendants’ misappropriation of the trade secrets is not provable, the Court “may order payment
21 of a reasonable royalty for no longer than the period of time the use could have been prohibited”
22 pursuant to the provisions of the California Uniform Trade Secrets Act. Cal. Civ. P. § 3426.3(b).
23 A reasonable royalty is also available under the Defend Against Trade Secrets Act. 18 U.S.C. §
24 1836(b)(3)(A)(iii) (“in lieu of damages measured by any other methods, the damages caused by
25 the misappropriation measured by imposition of liability for a reasonable royalty for the
26 misappropriator’s unauthorized disclosure or use of the trade secret”).

27 Waymo’s damages expert will analyze and compute the amount of reasonable royalty
28 damages payable to Waymo by Defendants due to the misappropriation of the trade secrets based

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1 on the documents and information produced by Waymo, Defendants and third parties during
2 discovery, as well as independent research conducted by Waymo’s damages expert. Specifically,
3 Waymo’s expert will, among other things, opine as to the appropriate reasonable royalty, either in
4 the form of a lump sum payment or a running royalty rate, or a combination of both.

5 As discussed above, Defendants have not yet responded to Waymo’s damages-related
6 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
7 to do so until the time that expert reports are due on August 24, 2017.

8 At present, Waymo anticipates that its expert’s computations of a reasonable royalty
9 adequate to compensate for Defendants’ infringement will involve an analytical approach and/or a
10 hypothetical negotiation approach. An analytical approach is used to determine a royalty that
11 leaves the infringer with a “normal” rate of return for the use of its products embodying the trade
12 secrets or to calculate a royalty based on the increased profitability due to the use of the trade
13 secrets in Defendants’ products. In other words, an analytical approach will determine, or isolate,
14 the financial benefit or value that Defendants obtained through their misappropriation of trade
15 secrets.

16 Waymo anticipates that its expert’s determination of reasonable royalty damages under an
17 analytical approach or a hypothetical negotiation approach will be based on, among other things,
18 analysis of sales and profit projections, analyst forecasts, profitability information and other
19 documents and records produced by Waymo, Defendants, and third parties. In addition to the
20 foregoing, Waymo’s expert may utilize documents and materials referred to and recognized as
21 relevant to the determination of the cost savings achieved by the Defendants due to their
22 misappropriation. In addition to the foregoing, Waymo’s expert may utilize documents and
23 materials referred to and recognized as relevant to the determination of a reasonable royalty or
24 other damages computations in cases such as *Georgia-Pacific*, among others.

25 At present, Waymo’s understanding of the primary considerations that Waymo’s expert
26 will analyze with respect to the hypothetical negotiation approach are summarized below.

27 *Impact on Waymo’s future expected profits* - Waymo expects that its future success is
28 critically dependent on its technological lead in autonomous vehicles. (WAYMO-UBER-

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00004108-131 at ‘109, ‘111; Chu Tr. 12:3-7, 45:19-24) Defendants’ misappropriation of Waymo’s trade secrets shortens the technological lead that Waymo has in autonomous vehicles. For example, when considering the acquisition of Ottomotto and Otto Trucking, Uber estimated that Otto’s technology could shorten its autonomous vehicle timeline by one to two years. (UBER00069030-033 at ‘033.) Moreover, if Uber does not exercise its Call Option with respect to Otto Trucking, yet another Waymo competitor will have had the benefit of Waymo’s misappropriated trade secrets. Given the importance of Waymo’s technological lead, this would likely have a significant impact on its ability to earn profits.

Waymo’s policy to protect and maintain its trade secrets – Waymo has sought to protect its trade secrets and has not disclosed the trade secrets to third parties, and it has not licensed its trade secrets. Waymo takes robust measures to protect its LiDAR trade secrets. As a condition of employment, Waymo requires all employees to enter into written agreements to maintain the confidentiality of proprietary and trade secret information, and not to misuse such information. Waymo also enforces an employee code of conduct that explains employees’ strict obligations to maintain the secrecy of confidential information, and requires employee training in security procedures. Droz Decl. ¶ 30.

Waymo also takes reasonable measures to mark confidential and proprietary information, such as documents and other materials, with visible legends designating them as such when sharing them outside of Waymo, subject to NDAs or other confidentiality agreements. Disclosures to vendors are limited to the subject matter necessary for the vendor’s engagement and do not reveal the entirety of a given LiDAR system or design. Waymo employs reasonable efforts to secure physical facilities by restricting access and employing locks, cameras, guards, and other security measures. *Id.* ¶¶ 33-37; Janosko Decl. ¶ 22.

Waymo uses Subversion (SVN) — a revision control system — to store its electrical design information. All traffic (both ingress to and egress from) the SVN repository is encrypted. All traffic is authenticated against a list of authorized users before access to the repository is granted, and users do not share credentials — all accesses are unique to specific users. Access control lists are audited monthly and stale users are aggressively purged. The SVN server is

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1 password protected and accessible through specialized software. *Id.* ¶¶ 23-25. Additionally,
2 Waymo imposes network security measures and access policies that restrict the access and
3 dissemination of certain confidential and proprietary trade secret information to only teams that
4 are working on projects related to that information. For example, Google employees working on
5 projects with no relation to Waymo or self-driving cars could not (and cannot) access Waymo’s
6 confidential and proprietary schematics. They are distributed on a “need to know” basis. Droz
7 Decl. ¶ 32. Google’s networks generally are also secured through Network Access Control
8 (“NAC”) procedures, Access Control Lists (“ACLs”), and restricted access privileges. Janosko
9 Decl. ¶¶ 13-16.

10 Google employs a variety of security mechanisms to prevent network intruders or attackers
11 who may compromise Waymo’s trade secret information. Google also secures employees’ devices
12 and credentials against attacks through monitoring and logging practices, as well as regular
13 security updates. *Id.* ¶¶ 7-12, 20.

14 Google secures its production infrastructure in progressive layers starting from the physical
15 security of data centers, continuing on to the security of the hardware and software that underlie
16 the infrastructure, and finally, the technical constraints and processes in place to support
17 operational security. Google employs many hundreds of engineers dedicated to security and
18 privacy distributed across all of Google, including many who are recognized industry authorities.
19 These engineers work to protect Google’s production servers from malware utilizing tools such as
20 binary verification. Google also has an incident management process for security events that may
21 affect the confidentiality, integrity, or availability of systems or data *Id.* ¶¶ 17-21.

22 Waymo incorporates by reference its Response to Interrogatory No. 7 and all supplements
23 thereto.

24 *Competitive relationship between Waymo and Uber and Otto Trucking* – Waymo
25 recognizes that Uber is the most significant competitor in the transportation as a service (TaaS)
26 business. (WAYMO-UBER-00004175-194 at ‘184-185) Similarly, Uber recognizes Waymo is a
27 significant competitor. In fact, as discussed above, Uber has described Waymo as an existential
28 threat to its TAAS business: “This war for self-driving is truly existential for Uber: we’ll either

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1 start up our second S curve of growth or we’ll die.” (UBER00070108-110 at ‘108.) Internal Uber
2 documents indicate that Uber believes it is in intense competition with Waymo: Discussing the
3 competition with Google, Mr. Holden discusses the battle and the war: “The *battle* is about what
4 we need to do to get ourselves into a sufficiently competitive position before December that G
5 doesn’t walk away with the crown for future of ride sharing. It’s about establishing beach heads,
6 being in the game in a credible way. The *war* is the long-term defeat of G and others so we
7 afford ourselves the opportunity to extend our massive scale business into the future. This will be
8 about who gets NSD self-driving to scale first.” (UBER00070108-110 at ‘108.) If Uber does not
9 exercise its Call Option with respect to Otto Trucking, Waymo will be facing two competitors
10 who have had the benefit of Waymo’s trade secrets.

11 *Development cost savings to Uber* – As discussed in more detail above, Uber has likely
12 realized significant cost savings in terms of its development timeline. While considering the
13 acquisition of Otto, Uber recognized one important benefit was that the acquisition “decreases
14 total investment in [Autonomous Vehicle] development.” (UBER00068983) An Uber email
15 estimates that Uber’s acquisition of Otto saved Uber at least a year in the race to large scale
16 autonomous vehicle deployment, and describes Uber’s next best choice as building the team
17 internally with a two to four year lag versus what the Otto team would bring. (UBER00060147-
18 156 at ‘147.) One way to measure the costs that Defendants saved through their misappropriation
19 of Waymo’s trade secrets is by looking at the costs that Waymo incurred to develop those trade
20 secrets. As discussed in Waymo’s response to interrogatory 6, Waymo has incurred up to \$1.1
21 billion to develop the trade secrets. (See Waymo’s 7/13 Supplemental Response to Interrogatory
22 No. 6 and all supplements thereto.)

23 *Increased future expected profits to Uber and/or Otto Trucking* – As discussed above in
24 the unjust enrichment section, Uber expected that acquiring Ottomotto and Otto Trucking would
25 accelerate the development of its LiDAR technology, and under its “most conservative case,”
26 Uber estimated the increased present value of incremental profit would be between \$836 million
27 and \$1.69 billion. (UBER00069030-033 at ‘033.)

28

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1 *LiDAR system cost savings* – Waymo has obtained significant cost savings by developing
2 custom, in-house LiDAR systems using its trade secrets, and Waymo expects that by
3 misappropriating Waymo’s trade secrets, Defendants will be able to obtain similar results.
4 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
5 as explained in more detail above and in Waymo’s response to Interrogatory No. 6, a mid-range
6 LiDAR from Velodyne costs approximately \$70,000. By contrast, the materials needed for
7 Waymo’s own mid-range GBr3 LiDAR system, which uses the trade secrets at issue in this case,
8 cost just over \$5,000. (*See* Waymo’s Response to Interrogatory No. 6 and all supplements
9 thereto.) Uber has also recently purchased third-party LiDAR units from [REDACTED]
10 each. (UBER00086529.)

11 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
12 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
13 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
14 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
15 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
16 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
17 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-
18 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
19 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
20 systems in 2018.

21 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
22 for its ridesharing business would likely drop substantially, in part because it would not have to
23 share any revenue with its drivers.

24 *Valuation of Uber’s acquisition* – As discussed above, Waymo is still obtaining discovery
25 regarding Uber’s internal valuation of Otto. However, Nina Qi testified that the Board was told
26 the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-103.)

27
28

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1 ***Unjust Enrichment / Reasonable Royalty Related To Otto Trucking's Use Of Waymo's***
2 ***Trade Secrets (Separate From Its Acquisition And Disclosure Of Those Trade Secrets To***
3 ***Ottomotto and Uber)***

4 Otto Trucking is also separately liable for damages with respect to its own use of Waymo’s
5 trade secrets, including through its subsidiary Otto Transport, which currently operates trucks for
6 the benefit of Uber’s freight program. (OTTOTRUCKING00002750.) Discovery is ongoing
7 regarding the use of Waymo's trade secrets by Otto Trucking and its subsidiaries pending the
8 completion of the acquisition by Uber. Waymo’s technical expert is continuing to assess
9 Defendants’ use of Waymo’s trade secrets; such assessments will ultimately inform the damages
10 analysis in this case. Moreover, Defendants have not yet responded to Waymo’s damages-related
11 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
12 to do so until the time that expert reports are due on August 24, 2017.

13 ***Punitive Damages, Attorneys Costs and Fees –***

14 Defendants’ trade secret misappropriation has been willful and malicious. If willful and
15 malicious trade secret misappropriation exists, both CUTSA and DTSA allow punitive damages
16 up to two times any damages award. *See* Cal. Civil Code Section § 3426.3 *and* 18 U.S.C. §
17 1836(b)(3)(C). If willful and malicious misappropriation exists, CUTSA and DTSA also allow
18 recovery of attorneys’ fees and costs. *See* § 3426.4 *and* 18 U.S.C. § 1836(b)(3)(D). In addition to
19 attorneys’ fees, Waymo is also eligible to receive reasonable expert fees under CUTSA. § 3426.4.

20 While discovery is not complete and Waymo has still not seen the Stroz due diligence
21 report (which Waymo expects will bear on this issue), the evidence to date indicates that Uber and
22 Anthony Levandowski were in league with one another to port Waymo’s trade secrets to Uber
23 going as far back as May 2015. (Dkt. 712, Ex. 1 (logging discussions between Uber and Mr.
24 Levandowski beginning on May 20, 2015 “wherein Anthony Levandowski mentioned LiDAR to
25 any officer, director, employee, agent, supplier, or consultant of defendants”).) Uber continued to
26 meet with Mr. Levandowski throughout the fall of 2015. (Dkt. 712, Ex. 1 (logging five meetings
27 with Mr. Levandowski regarding LiDAR between October 2015 and December 11, 2015).) Uber
28 met with Mr. Levandowski to discuss LiDAR on the very same day that he downloaded 14,000

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1 proprietary files from Waymo servers, (Dkt. 712 Ex. 1; Dkt. 23, ¶ 44), and again a few weeks later
2 on the same day Mr. Levandowski downloaded additional proprietary information from Waymo.
3 (Ex. 263; Dkt. 24-2 ¶ 22.)

4 When Uber began meeting with Otto, Otto did not have any products. (Qi Tr. 146:8-18.)
5 Instead, Uber acquired Mr. Levandowski’s company because of its “[e]xperience w/ automotive
6 efforts of competitors”:

7 Anthony and his close team have developed several generations of mid and long
8 range laser that we now believe is critical to AV autonomy (day and night). Not
9 only do they have the several generations of experience but also know how to
10 improve on the next gen devices that they would build for us. We have yet to find
11 anyone else in the world with this know-how. . . . Second, just rubbing shoulders
12 with this team and having them advise us all over AV has a decent chance of
saving Uber at least a year off of the race to large scale AV deployment. . . . My
point is that there is more value here (considerable) than 25 disparate engineers that
we would pick up from 25 different places. This is a team that knows each other
knows the tech, knows the potholes and can jam at incredible rate (we hope) to help
solve some of our most pressing challenges.

13 (Ex. 271 at 1.) While Mr. Bares refers to the “team” that Mr. Levandowski was going to bring to
14 his new company, there was no team in place other than Mr. Levandowski and Mr. Ron at the time
15 of this email.

16 Given Uber’s scheme to buy Waymo’s “tech” and “know how” through Mr. Levandowski
17 (and the corporate entities Ottomotto and Otto Trucking), Uber began anticipating litigation with
18 Waymo almost immediately. The day after Mr. Levandowski resigned from Waymo, Uber was
19 already discussing indemnity with Mr. Levandowski and Lior Ron. (Ex. 277, January 28, 2016
20 email from Cameron Poetzsch asking Travis Kalanick, “[d]id you tell Anthony that you would
21 indemnify them if they get sued by G as part of or after the deal? They’re under that impression.”)
22 By February 5, 2016, the parties were specifically discussing indemnity for “Bad Acts,” *including*
23 “downloading of files of [Google].” (UBER00017265 at -73, Email between Uber representatives
24 and Lior Ron discussing “Timing of Indemnity / Closing Conditions,” and an “Example list of
25 Specified Bad Acts,” which included “downloading of files of [Google]”).

26 Having agreed to indemnify Mr. Levandowski for “downloading of files of [Google]” and
27 having agreed to indemnify Ottomotto and Otto Trucking for Bad Acts including trade secret
28 misappropriation, Uber then set up a forensic due diligence investigation designed specifically to

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1 uncover – or confirm – the downloaded Waymo files in Otto’s or Mr. Levandowski’s possession.
2 The existence and sheer scope of this investigation is proof enough that Uber knew Mr.
3 Levandowski had Waymo materials: it was, and remains, a process that was unprecedented for
4 Uber. (Poetzsch Tr. at 128:11-25; Qi Rough Tr. at 243:17-244:3.) As part of the investigation,
5 Stroz took and analyzed the electronic devices of five different Otto employees, including both
6 their personal and work devices. (See Ron Tr. at 96:3-19.) Despite this, the Uber witnesses
7 responsible for overseeing the investigation testified that the diligenced employees did not seem
8 upset by the scope of the investigation that Uber requested; instead, they were “okay with it.” (Qi
9 Rough Tr. at 223:22-224:6.) The most likely explanation for that is, of course, that all parties
10 already knew what Uber was looking for—stolen Waymo files.

11 Although Uber must have known about the downloaded files when it agreed to indemnify
12 Mr. Levandowski and set up the forensic investigation, Uber almost certainly found out that Mr.
13 Mr. Levandowski had downloaded materials when the diligence process got underway. To
14 motivate Mr. Levandowski to disclose *all* of his “Bad Acts” to Stroz, Uber created an elaborate
15 incentive structure: as long as Mr. Levandowski disclosed his “Bad Acts” (including
16 “downloading of files of [Google]”) to Stroz, Uber would indemnify him. (UBER00017265 at -
17 73-74; Dkt. 566 at 3.) If Mr. Levandowski did not disclose “Bad Acts” to Stroz, Levandowski
18 could not seek indemnification from Uber for those “Bad Acts” later. (*Id.*) Although Waymo has
19 still not seen the due diligence report that Stroz produced, all evidence indicates that Mr.
20 Levandowski accepted this offer and disclosed the existence of the stolen information to Uber and
21 Stroz. Defendants have never disputed that Stroz has some of the stolen information in its
22 possession as a result of the due diligence process, and Uber recently admitted that its lawyers
23 have also possessed the stolen information for over a year by virtue of their involvement in the due
24 diligence process. (Dkt. 677-8.)

25 *At the very latest*, Uber learned that Mr. Levandowski had downloaded Waymo materials
26 in his possession on March 11, 2016 when Mr. Levandowski told Uber outright. As Uber has
27 explained: “On or about March 11, 2016, Mr. Levandowski reported to [Travis] Kalanick, Nina Qi
28 and Cameron Poetzsch at Uber as well as Lior Ron that he had identified five discs in his

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1 possession containing Google information.” (Dkt. 695 at 4.) Uber’s accounting indicates that Mr.
2 Levandowski and Mr. Kalanick had a meeting to discuss LIDAR on the same day. (Dkt. 712, Ex.
3 1 at No. 63.) Since receiving this interrogatory response, Waymo has deposed three of the four
4 individuals to whom Mr. Levandowski made this admission, and all three confirmed that Mr.
5 Levandowski did indeed reveal that he had Google “stuff” in his possession during an in-person
6 meeting with Uber on March 11, 2016. (Ron Tr., 25:23-26:18; Poetzscher Tr., 249:3-250:9; Qi
7 Rough Tr., 271:11-273:20.) Uber now insists that Mr. Levandowski subsequently destroyed the
8 materials (raising other serious concerns, including concerns regarding the integrity of Stroz’s
9 investigation), but the point remains: Uber was aware of Mr. Levandowski taking confidential
10 Waymo information files as of March 11, 2016, and Uber acquired Mr. Levandowski’s company
11 anyway. And even after finding out that he had Waymo materials in his possession on March 11,
12 2016, Uber *never* took *any* steps to prohibit Mr. Levandowski from using his “treasure trove of
13 files” in his work at Uber.

14 Waymo also seeks prejudgment interest on the damages awarded for the misappropriation
15 of trade secrets at the California statutory prejudgment interest rate of seven percent (7%).
16

17 INTERROGATORY NO. 11:

18 Identify all facts supporting your contention that Waymo owns each of the alleged trade
19 secrets identified in Waymo’s 2019 Disclosure.
20

21 RESPONSE TO INTERROGATORY NO. 11:

22 Waymo incorporates by reference its General Objections. Waymo further objects to this
23 interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including to
24 the extent that it asks Waymo to “identify all facts.” Waymo further objects to this request to the
25 extent it is compound, complex, and contains multiple subparts.

26 Subject to and without waiving the foregoing General and Specific Objections, Waymo
27 responds as follows:
28

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1 DATED: July 25, 2017

QUINN EMANUEL URQUHART & SULLIVAN,
LLP

2
3 By /s/ Charles K. Verhoeven

Charles K. Verhoeven
Attorneys for WAYMO LLC

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EXHIBIT 1

***[CORRECTED]
UNREDACTED VERSION
OF DOCUMENT(S)
SOUGHT TO BE SEALED***

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11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 WAYMO LLC

14 Plaintiffs,

15 v.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO, LLC; OTTO TRUCKING
18 LLC,

19 Defendants.

Case No. 17-cv-00939-JCS

**PLAINTIFF’S FIRST SUPPLEMENTAL
OBJECTIONS AND RESPONSES TO
OTTO TRUCKING, LLC’S FIRST SET OF
INTERROGATORIES (NOS. 1-14)**

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLYINTERROGATORY NO. 10:

Identify all damage, including a specific calculation of monetary damages, caused by any alleged misappropriation of trade secrets by Otto Trucking.

RESPONSE TO INTERROGATORY NO. 10:

Waymo incorporates by reference its General Objections. Waymo further objects to this interrogatory on the grounds that it is vague and ambiguous, including with respect to the phrase “all damage.” Waymo further objects to this request to the extent it is compound, complex, and contains multiple subparts. Waymo further objects to this interrogatory as premature to the extent it calls for information that is subject to expert testimony. Waymo will provide expert testimony in accordance with the Court’s procedural schedule.

Subject to and without waiving the foregoing General and Specific Objections, Waymo responds as follows:

Waymo believes it has suffered and is suffering irreparable harm as a result of Otto Trucking’s trade secret misappropriation. In addition, Waymo believes it is entitled to damages for Otto Trucking’s trade secret misappropriation, particularly to the extent Otto Trucking has used Waymo’s trade secrets to fast-track LiDAR development for its own benefit or for the benefit of Ottomotto or Uber. Waymo is continuing its discovery into the nature and extent of Otto Trucking’s use of Waymo’s trade secrets for its benefit, for the benefit of Ottomotto, and/or for the benefit of Uber. Waymo is also continuing its discovery into the role of Otto Trucking vis-à-vis Ottomotto and Uber as a conduit of misappropriated information from Mr. Levandowski and Ottomotto/Uber. A specific calculation of monetary damages caused by Otto Trucking’s misappropriation cannot be provided until this discovery is more substantially complete.

Waymo expects to calculate past damages based on lost profits, unjust enrichment, and reasonable royalty metrics. To the extent an injunction is not granted, Waymo will also seek damages, based on these same metrics, tied to any continuing use of Waymo’s trade secrets.

Inputs to Waymo’s damages analysis vis-à-vis Otto Trucking include, for example: the extent, duration, and purpose of trade secret misappropriation; estimates of future profits and cash

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1 flows to be earned by Otto Trucking (or those benefiting from its trade secret misappropriation)
2 and Waymo; assessments and projections regarding the relevant markets, competition therein, and
3 the relevant parties’ competitive positions; investment in LiDAR technology (in time, capital,
4 engineering costs, and other expenditures); and valuations of the relevant technology. Discovery
5 on these subjects is ongoing.

6 Waymo further seeks a judgment that this case is exceptional and an award of Waymo’s
7 costs and reasonable attorneys’ fees. Waymo also seeks an accounting of all sales and revenues,
8 together with pre-judgment and post-judgment interest. Waymo further seeks enhanced damages
9 for Defendants’ willful and malicious conduct in misappropriating Waymo’s trade secrets,
10 punitive damages, and other relief including but not limited to disgorgement of profits from unjust
11 enrichment. Waymo seeks any other relief available under applicable law. It would be premature
12 to estimate the amount of damages at this time.

13 Discovery is ongoing and Waymo reserves the right to supplement – and anticipates
14 regularly supplementing – this response after further discovery and investigation into Otto
15 Trucking’s misappropriation of Waymo’s trade secrets and the benefits obtained by Defendants as
16 a result of that misappropriation.

17
18 FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:

19 Waymo objects to this interrogatory on the grounds that it is vague and ambiguous,
20 including with respect to the phrase “all damage.” Waymo further objects to this interrogatory to
21 the extent it is compound, complex, and contains multiple subparts. Waymo further objects to this
22 interrogatory as premature to the extent it calls for information that is subject to expert testimony.
23 Waymo will provide expert testimony in accordance with the Court’s procedural schedule.

24 Subject to and without waiving the foregoing objections, Waymo responds as follows:

25 Waymo’s technical expert is continuing to assess Defendants’ use of Waymo’s trade
26 secrets; such assessments will ultimately inform the damages analysis in this case. Moreover,
27 Defendants have not yet responded to Waymo’s damages-related discovery requests. Therefore,
28

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1 Waymo’s expert has not concluded his analysis and is not expected to do so until the time that
2 expert reports are due on August 24, 2017.

3 Discovery in this case is ongoing, and Waymo is still waiting for substantive responses to
4 its Fourth Set of Requests for Production (Nos. 266-297) and First Set of Common and Specific
5 Interrogatories, all of which relate to damages. Specifically, Waymo expects Defendants’
6 responses to the following document requests and interrogatories to inform its response to this
7 interrogatory, and Waymo expects to supplement its response to this interrogatory when it
8 receives Defendants’ document production and interrogatory responses:

- 9 • DOCUMENTS sufficient to show UBER’s market capitalization and internal
10 valuation of itself on a quarterly basis, from the year prior to the year in which
11 UBER first contemplated developing autonomous vehicles through the present.
- 12 • DOCUMENTS sufficient to show the impact of developing autonomous vehicles
13 on Uber’s internal valuation of itself from the year prior to the year in which UBER
14 first contemplated developing autonomous vehicles through the present.
- 15 • DOCUMENTS describing UBER’s development of autonomous vehicles as
16 necessary to the continued viability of UBER or to the continued viability of any
17 aspect of UBER’s business, INCLUDING but not limited to characterizations of a
18 competitor’s development or deployment of autonomous vehicles as an existential
19 threat to UBER.
- 20 • DOCUMENTS sufficient to show each iteration of DEFENDANTS’ plan to launch
21 any autonomous vehicles in any geographic region from the time DEFENDANTS
22 first contemplated developing or deploying autonomous vehicles to the present.
- 23 • DOCUMENTS sufficient to show DEFENDANTS’ estimates of the size of the
24 ridesharing market and DEFENDANTS’ share of that market in the United States
25 for each of the last six years on a quarterly basis. To the extent DEFENDANTS
26 break out such estimates by geography (region, city, etc.), those estimates should
27 also be provided.
- 28 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts of the size of the
ride-sharing market, the percentage of the ride-sharing market that will be serviced
by autonomous vehicles, and DEFENDANTS’ share of that market in the United
States (by autonomous vehicles and vehicles driven by contractors) for any period
of time forecasted by UBER, on a quarterly basis. To the extent DEFENDANTS
break out such estimates by geography (country, region, city, etc.), those estimates
should also be provided. To the extent DEFENDANTS create different forecasts
based on different assumptions, documents REGARDING each forecast – with
documents sufficient to show the assumptions for each – should be provided.

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- 1 • DOCUMENTS sufficient to show DEFENDANTS’ forecasts REGARDING the
2 number of DEFENDANTS’ ride-sharing vehicles in the United States (by
3 autonomous vehicles and vehicles driven by contractors), for any period of time
4 forecasted by UBER —broken out by on a quarterly basis. To the extent
5 DEFENDANTS break out such estimates by geography (country, region, city, etc.),
6 those estimates should also be provided. To the extent DEFENDANTS create
7 different forecasts based on different assumptions, documents REGARDING each
8 forecast – with documents sufficient to show the assumptions for each – should be
9 provided.
- 10 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
11 operating plans, marketing plans, financial plans, sales plans, and investment plans
12 for its ridesharing business, INCLUDING projections for revenue generation and
13 profitability.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ business plans, strategic plans,
15 operating plans, marketing plans, financial plans, sales plans, and investment plans
16 for its autonomous vehicle program, INCLUDING projections for revenue
17 generation and profitability of the autonomous vehicle program.
- 18 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of any barriers to
19 entry in the ride-sharing market and the status of any attempts by DEFENDANTS
20 to enforce such barriers against competitors INCLUDING WAYMO, INCLUDING
21 investments and infrastructure needed.
- 22 • DOCUMENTS REGARDING DEFENDANTS’ discussion of WAYMO or its
23 business, INCLUDING DEFENDANTS’ analysis of WAYMO’s impact or
24 potential impact on the ridesharing market or on UBER.
- 25 • DOCUMENTS sufficient to identify the date that UBER first considered deploying
26 autonomous vehicles.
- 27 • DOCUMENTS sufficient to identify the date that UBER first considered
28 developing its own autonomous vehicles.
- DOCUMENTS sufficient to identify the date that UBER first considered
 developing its own in-house LiDAR.
- DOCUMENTS REGARDING the importance of a first-mover advantage in
 commercializing autonomous vehicles, INCLUDING any estimates of the market
 shares of other entrants that are not first to market.
- DOCUMENTS REGARDING the importance of LiDAR, INCLUDING the
 importance of low-cost LiDAR, to DEFENDANTS’ ability to compete.

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- 1 • DOCUMENTS REGARDING the relative value of safety (vis-à-vis, for example,
2 cost and timing of entry into relevant markets) in the commercialization of
3 autonomous vehicles.
- 4 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of WAYMO’s
5 technological lead REGARDING autonomous vehicle technology (INCLUDING
6 DEFENDANTS’ estimates of the time, personnel, and investment needed to close
7 the gap between DEFENDANTS and WAYMO), and documents sufficient to show
8 how DEFENDANTS’ analysis or estimates have changed over time.
- 9 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
10 technological lead over DEFENDANTS REGARDING autonomous vehicle
11 technology (INCLUDING DEFENDANTS’ estimates of the time, personnel, and
12 investment needed to close the gap between DEFENDANTS and WAYMO)
13 changed after Uber’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 14 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
15 technological lead over DEFENDANTS REGARDING LiDAR technology (INCLUDING
16 DEFENDANTS’ estimates of the time, personnel, and investment needed to close
17 the gap between DEFENDANTS and WAYMO), and documents sufficient to show
18 how DEFENDANTS’ analysis or estimates have changed over time.
- 19 • DOCUMENTS sufficient to show DEFENDANTS’ analysis of how WAYMO’s
20 technological lead over DEFENDANTS REGARDING LiDAR technology
21 (INCLUDING DEFENDANTS’ estimates of the time, personnel, and investment
22 needed to close the gap between DEFENDANTS and WAYMO) changed after
23 UBER’s acquisition of OTTOMOTTO and OTTO TRUCKING.
- 24 • DOCUMENTS sufficient to show DEFENDANTS’ comparisons of the cost and
25 profitability of a human-driven versus an autonomous vehicle in a ride-sharing
26 fleet.
- 27 • DOCUMENTS sufficient to show the historical and current cost of
28 DEFENDANTS’ autonomous vehicles, broken down by component, and dating
 back to the inception of DEFENDANTS’ autonomous vehicle program. As noted
 in the Instructions above, to the extent DEFENDANTS can provide separate
 information for each Defendant, DEFENDANTS should do so.
- DOCUMENTS sufficient to show DEFENDANTS’ total financial investment
 including but not limited to employee time, purchase of capital equipment, and
 outside consultants, by quarter, into its efforts to develop in-house LiDAR. As
 noted in the Instructions above, to the extent DEFENDANTS can provide separate
 information for each Defendant, DEFENDANTS should do so.
- DOCUMENTS sufficient to show DEFENDANTS’ investment, in terms of time
 including but not limited to engineers, software developers, managers, and
 executives (broken out by each category of employee), into its efforts to develop in-
 house LiDAR. As noted in the Instructions above, to the extent DEFENDANTS

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1 can provide separate information for each Defendant, DEFENDANTS should do
2 so.

- 3 • Patent licenses or agreements relating to LiDAR.
- 4 • DOCUMENTS sufficient to show the impact to DEFENDANTS of having to
5 redesign Fuji to avoid using the trade secrets identified in response to UBER’s
6 interrogatory No. 1.
- 7 • DOCUMENTS sufficient to show any valuation (whether conducted by UBER or
8 by a third party) of the assets and technology acquired in the acquisition of Otto by
9 Uber, INCLUDING valuations performed for the purpose of purchase price
10 accounting or any other purpose.
- 11 • DOCUMENTS sufficient to show any DEFENDANTS’ projected revenue, gross
12 margin, and operating profit for any division including autonomous vehicles.
- 13 • DOCUMENTS sufficient to show any the financials, INCLUDING profit and loss
14 statements and balance sheet, for OTTOMOTTO, OTTO TRUCKING, and any
15 division of UBER including autonomous vehicles.
- 16 • DOCUMENTS sufficient to show DEFENDANTS’ approved requests for capital
17 expenditure authorizations related to its autonomous vehicle program,
18 INCLUDING R&D expenditures, technology/equipment acquisitions, and
19 marketing expenditures.
- 20 • Describe in detail the impact, including financial impact, to DEFENDANTS of
21 having to redesign Fuji to avoid using the trade secrets identified in response to
22 UBER’s Interrogatory No. 1.
- 23 • To the extent DEFENDANTS contend they will be irreparably harmed by a
24 permanent injunction prohibiting the use of WAYMO’s trade secrets in this case,
25 describe in detail the factual and legal bases for that contention.
- 26 • Describe in detail DEFENDANTS’ investment in developing in-house LiDAR.
27 This should include DEFENDANTS’ financial investment, as well as
28 DEFENDANTS’ investment in terms of time and personnel.
- Describe in detail [OTTOMOTTO and OTTO TRUCKING’s] efforts to place a
value on OTTOMOTTO and/or OTTO TRUCKING or their respective assets and
technology as part of UBER’S acquisition of OTTOMOTTO and/or OTTO
TRUCKING, either prior to or following the acquisition.
- Describe in detail UBER’s efforts to place a value on OTTOMOTTO and/or OTTO
TRUCKING or their respective assets and technology as part of the acquisition,
either prior to or following the acquisition, including but not limited to the efforts
described by Nina Qi during her deposition at Rough Tr. 192:4-199:15.

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- IDENTIFY the date that UBER first considered developing its own in-house LiDAR and the date UBER began developing its own in-house LiDAR (to the extent it differs from the date UBER began considering it), and describe in detail UBER’s reasons for wanting to develop its own in-house LiDAR.

Damages for Violations of Defense of Trade Secrets Act and California Uniform Trade Secret Act

Uber, Ottomotto, and Otto Trucking are jointly and severally liable for damages in this case. Ottomotto and Otto Trucking are the corporate vehicles for the misappropriation of Waymo’s trade secrets for the benefit of Uber. Anthony Levandowski officially formed Ottomotto on January 15, 2016 (while he was simultaneously employed by Waymo, consulting with Uber on Uber's self-driving car project, and negotiating the acquisition of Ottomotto). He officially formed Otto Trucking on February 1, 2016 (five days after resigning from Waymo and while he was consulting with Uber on Uber's self-driving car project and negotiating the acquisition of Otto Trucking). Mr. Levandowski was acting for all three Defendants at various times in order to facilitate the misappropriation of Waymo's trade secrets.

Uber entered into Agreements and Plans of Merger with each of Ottomotto and Otto Trucking on the same date, within weeks of the formation of those entities. (UBER00016757; UBER00016453). Pursuant to its Agreement and Plan of Merger, Otto Trucking was obligated and continues to be obligated to assign all of its intellectual property to Ottomotto (which has now been acquired by Uber). (UBER00016757.) Pending completion of the Otto Trucking acquisition by Uber, Anthony Levandowski remains one of two managing members of Otto Trucking and holds [REDACTED] of its shares. (OTTOTRUCKING00000004.) Uber has an exclusive option to acquire Otto Trucking between August 31, 2017 and November 30, 2017. (UBER00016757 at -764, -819.) If Uber does not acquire Otto Trucking during that period, Uber will be obligated to (i) become a 50% owner in Otto Trucking and (ii) to license Uber's self-driving technology (including all trade secrets) exclusively to Otto Trucking (even vis-à-vis Uber) for use in the commercialization of self-driving trucks. (UBER00016757 at -772.)

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1 Otto Trucking is jointly and severally liable for all damages caused by Defendants'
2 misappropriation of Waymo's trade secrets, including Defendants' unjust enrichment resulting
3 from Defendants' misappropriation, any reasonable royalty assessed as a result of Defendants'
4 misappropriation, and any exemplary damages, attorneys' fees, expert fees, and costs awarded as a
5 result of Defendants' misappropriation.

6 ***Unjust Enrichment Damages***

7 Uber, Ottomotto, and Otto Trucking have been unjustly enriched due to their
8 misappropriation of Waymo’s trade secrets. There are several measures that can be used to
9 quantify the unjust enrichment to Defendants. One measure of the unjust enrichment to
10 Defendants is the value that was paid (or will be paid) by Uber for Ottomotto and Otto Trucking
11 (collectively, “Otto”). When Uber began negotiating with Mr. Levandowski, Otto was a company
12 that did not exist, and did not have any products. (Qi Tr. 146:8-18.) And at that time, Uber was
13 aware that he still had confidential information from Waymo. (Bares Tr. at 179:14-18.) John
14 Bares, Operations Director in Uber’s Advanced Technology Group, was personally responsible for
15 negotiating aspects of Uber’s acquisition of Otto on Uber’s behalf, including a series of technical
16 milestones regarding LiDAR. He admitted that having access to Waymo’s specifications for
17 medium and long-range LiDAR would have been useful for someone trying to build medium and
18 long-range LiDAR at Uber because Waymo is “eight years ahead” and “had custom lasers.” (*Id.*
19 179:19-180:12.) Defendants do not dispute that Mr. Levandowski had access to Waymo’s files at
20 this time—as a result of both his ongoing employment at Waymo, and his illicit downloads.

21 Uber and Otto began negotiating the term sheet for the acquisition of Otto in January and
22 February 2016, with the final term sheet executed on February 22, 2016. (UBER00017518-578;
23 UBER00069043-064.) For at least some of this period, Mr. Levandowski was still an employee of
24 Google. Because Otto had no products when Uber and Otto began negotiating (Qi Tr. 146:8-18),
25 the only things of value to be acquired by Uber were likely (1) the engineers that Uber acquired;
26 and (2) Waymo’s technology. Therefore, the misappropriated trade secrets represented a
27 significant portion of the assets acquired by Uber, as well as the talents of the employees that
28 would be engaged in connection with the acquisition.

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1 Uber and Otto entered into the formal Agreement and Plan of Merger on April 11, 2016.
 2 (UBER00016453-16523; UBER00016757.) Prior to entering into the agreement, Uber’s Board of
 3 Directors approved the acquisition. Discovery regarding Uber’s internal valuation of Otto
 4 (including information regarding the assumptions underlying Uber’s internal valuation of Otto)
 5 will further inform Waymo’s unjust enrichment analysis. However, Nina Qi testified that Uber
 6 told its Board that the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-
 7 103.) Although Uber’s payment to Otto was conditioned on certain milestones that stretched for
 8 some time into the future, this value is a reasonable measure of the present value of the transaction
 9 given that it was the value presented to Uber’s Board of Directors in the Board’s consideration and
 10 approval of the acquisition.

11 Another measure of the unjust enrichment to Defendants is the present value of the
 12 additional cash flows that Defendants will earn as a result of Uber’s accelerated development of
 13 self-driving car technology. Uber expected that acquiring Otto would accelerate the development
 14 of its LiDAR technology. For example, when considering the acquisition, Uber estimated that
 15 acquiring Otto could shorten its autonomous vehicle timeline by one to two years.
 16 (UBER00069030-033 at ‘033.) Even under its “most conservative case,” Uber estimated the
 17 increased present value of incremental profit (as measured by EBIT, or Earnings Before Interest
 18 and Taxes) from Otto’s technology would be between \$836 million and \$1.69 billion.
 19 (UBER00069030-033 at ‘033.) In addition to the increased profits, Uber recognized Waymo was
 20 a threat to its entire existence, potentially placing its entire business at risk—something that,
 21 according to public reports, is worth approximately \$70 billion. (See
 22 [https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)
 23 [industry-watchers/](https://techcrunch.com/2017/06/21/kalanick-is-out-but-ubers-vcs-royally-screwed-up-too-say-industry-watchers/)). For example, Uber’s then-CEO was quoted as follows: “The minute it was
 24 clear to us that our friends in Mountain View were going to be getting in the ride sharing space,
 25 we needed to make sure there is an alternative [self-driving car]. Because if there is not, we’re not
 26 going to have any business.” He also described developing an autonomous vehicle as “basically
 27 existential for us.” (UBER0006042-047 at ‘043; UBER0006035-041 at ‘037; UBER00064472-
 28 473; LEV_001940-051 at ‘940.) In messaging notes related to the acquisition, Uber’s then-CEO

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1 noted “Autonomous transportation is very possibly a winner-take-all, and thus existential for
2 Uber.” (UBER00064468-469 at ‘468.) Similarly, Jeff Holden, Uber’s Chief Product Officer,
3 wrote: “This war for self-driving is truly existential for Uber: we’ll either start up our second S
4 curve of growth or we’ll die. There might be in-between cases, but it’s definitely easy to see how
5 the extremes could play out.” Discussing the competition with Google, Mr. Holden discusses the
6 battle and the war: “The *battle* is about what we need to do to get ourselves into a sufficiently
7 competitive position before December that G doesn’t walk away with the crown for future of ride
8 sharing. It’s about establishing beach heads, being in the game in a credible way. The *war* is
9 the long-term defeat of G and others so we afford ourselves the opportunity to extend our massive
10 scale business into the future. This will be about who gets NSD self-driving to scale first.”
11 (UBER00070108-110 at ‘108.)

12 Another measure of unjust enrichment to Defendants is the expected cost savings to
13 Defendants from using Waymo’s trade secrets in Uber’s LiDAR systems. Waymo has obtained
14 significant cost savings by developing custom, in-house LiDAR systems using its trade secrets.
15 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
16 as explained in more detail in Waymo’s response to Interrogatory No. 6, a mid-range LiDAR from
17 Velodyne costs approximately \$70,000. Uber has also recently purchased third-party LiDAR
18 units from [REDACTED] (UBER00086529.) By contrast, the materials needed for
19 Waymo’s own mid-range GBR3 LiDAR system, which uses the trade secrets at issue in this case,
20 cost just over \$5,000. (See Waymo’s Response to Interrogatory No. 6 and all supplements
21 thereto.)

22 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
23 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
24 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
25 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
26 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
27 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
28 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-

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1 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
2 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
3 systems in 2018.

4 Another measure of unjust enrichment to Defendants is the expected cost savings due to
5 reduced development expenses from using Waymo’s trade secrets in Uber’s LiDAR systems.
6 While considering the acquisition of Otto, Uber recognized one important benefit was that the
7 acquisition “decreases total investment in [Autonomous Vehicle] development.”
8 (UBER00068983) An internal Uber email estimates that Uber’s acquisition of Otto saved Uber at
9 least a year in the race to large scale autonomous vehicle deployment, and describes Uber’s next
10 best choice as building the team internally with a two to four year lag versus what the Otto team
11 would bring. (UBER00060147-156 at ‘147.) One way to measure the costs that Defendants saved
12 through their misappropriation of Waymo’s trade secrets is by looking at the costs that Waymo
13 incurred to develop those trade secrets. As discussed in Waymo’s response to interrogatory 6,
14 Waymo has incurred up to \$1.1 billion to develop the trade secrets. (See Waymo’s 7/13
15 Supplemental Response to Interrogatory No. 6 and all supplements thereto.)

16 Waymo anticipates that Defendants will argue that the measures of unjust enrichment
17 discussed above are measures of value for the entirety of the company (Otto) acquired by Uber.
18 Waymo expects to rebut any evidence presented by Defendants that a portion of any value can be
19 attributed to any contributions other than Waymo’s trade secrets. Nonetheless, Waymo addresses
20 apportionment below.

21 Otto had no products when Uber and Otto began negotiating. (Qi Tr. 146:8-18.) And
22 Otto’s profit and loss statement for January through March 2016 reflects less than \$1.4 million of
23 expenses. (UBER00060164 and UBER00060165). Therefore, the only things of value to be
24 acquired by Uber were likely (1) the engineers that Uber acquired; and (2) Waymo’s technology.
25 Waymo is still conducting discovery regarding what assets (if any) Otto had when Uber decided to
26 acquire it. To the extent Otto had any working products or technology by the time Uber agreed to
27 acquire it, Waymo’s unjust enrichment analysis would account for that by deducting the value of
28 Otto’s then-existing technology. However, as previously discussed, Waymo expects the large

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1 majority of the measures of value discussed above to be attributable to the value of the stolen
2 information and engineers that Uber acquired in the transaction.

3 With respect to the value of the engineers Uber acquired from Otto, talented engineers in
4 the autonomous vehicle field are few and far between. In particular, some of the engineers who
5 left Waymo to join Otto, and who were eventually acquired by Uber, had very specialized skill
6 sets, including Don Burnette, Claire Delaunay, Gaetan Pennecot and Mr. Levandowski himself.
7 These engineers would likely be worth more than an average engineer, and more than even an
8 average autonomous vehicle engineer. Waymo is still obtaining discovery regarding Uber’s
9 valuation of the engineers that it acquired, but one public estimate of the value of engineers in the
10 autonomous vehicle industry is \$10 million per engineer.
11 (<https://www.recode.net/2016/9/17/12943214/sebastian-thrun-self-driving-talent-pool>).

12 With respect to development expenses, it is possible that Defendants would not have had
13 to incur all of the development expenses Waymo incurred if Defendants had developed the trade
14 secrets themselves (rather than misappropriating them from Waymo). Although Waymo is still
15 seeking discovery on how long Uber spent in its autonomous vehicle development efforts before
16 acquiring Otto, Waymo understands that Uber had been developing autonomous vehicle
17 technology prior to its discussions with Otto. Uber may argue that in calculating Uber’s unjust
18 enrichment based on Waymo’s development expenses, it may be appropriate to include only a
19 portion of Waymo’s total development expenses. To date, Defendants have not produced
20 evidence regarding their LiDAR development efforts necessary to conduct such an apportionment.
21 However, as discussed above, Uber believed that it could save development expenses by acquiring
22 Otto. Specifically, Uber estimated that the acquisition would speed up its autonomous vehicle
23 timeline by one to two years, and would speed up its laser development by two to four years.
24 Thus, one estimate of the potential savings as a result of Defendants obtaining Waymo’s
25 technology is the one to two years of average development expense that Uber estimated it would
26 save in developing autonomous vehicle technology, which can be expressed as a percentage of
27 Uber’s total development expenses. Another measure of the potential savings as a result of
28 Defendants obtaining Waymo’s technology is the difference between the amount of money

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1 Waymo has spent in developing autonomous vehicle technology and the amount of money that
2 Defendants have spent. Another measure of the potential savings can be calculated based on the
3 proportion of development expenses that Waymo has spent in developing LiDAR technology in
4 relation to the other technologies in autonomous vehicles. Waymo reserves its right to
5 supplement this response if and when Defendants produce the information necessary to conduct an
6 apportionment regarding development expenses.

7 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
8 for its entire ridesharing business would likely drop substantially, in part because it would not
9 have to share any revenue with its drivers.

10 Waymo is under a Court order to narrow its list of asserted trade secrets to less than ten by
11 August 1. After Waymo completes this narrowing, Waymo will consider how to apportion the
12 value of the trade secrets that Mr. Levandowski and Defendants misappropriated to account for the
13 trade secrets that it will bring to trial in this case. However, Waymo suspects that a substantial
14 portion of the unjust enrichment would be attributable to the most valuable trade secrets. Since
15 Uber and Waymo are racing to commercialize autonomous vehicles, accelerating the development
16 timeline was important to Uber. (UBER00070108-110 at ‘108.). Thus, Waymo presumes that
17 Defendants made use of the most important and most valuable trade secrets first.

Reasonable Royalty Damages

18
19 If the Court were to determine that damages based on the unjust enrichment caused by
20 Defendants’ misappropriation of the trade secrets is not provable, the Court “may order payment
21 of a reasonable royalty for no longer than the period of time the use could have been prohibited”
22 pursuant to the provisions of the California Uniform Trade Secrets Act. Cal. Civ. P. § 3426.3(b).
23 A reasonable royalty is also available under the Defend Against Trade Secrets Act. 18 U.S.C. §
24 1836(b)(3)(A)(iii) (“in lieu of damages measured by any other methods, the damages caused by
25 the misappropriation measured by imposition of liability for a reasonable royalty for the
26 misappropriator’s unauthorized disclosure or use of the trade secret”).

27 Waymo’s damages expert will analyze and compute the amount of reasonable royalty
28 damages payable to Waymo by Defendants due to the misappropriation of the trade secrets based

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1 on the documents and information produced by Waymo, Defendants and third parties during
2 discovery, as well as independent research conducted by Waymo’s damages expert. Specifically,
3 Waymo’s expert will, among other things, opine as to the appropriate reasonable royalty, either in
4 the form of a lump sum payment or a running royalty rate, or a combination of both.

5 As discussed above, Defendants have not yet responded to Waymo’s damages-related
6 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
7 to do so until the time that expert reports are due on August 24, 2017.

8 At present, Waymo anticipates that its expert’s computations of a reasonable royalty
9 adequate to compensate for Defendants’ infringement will involve an analytical approach and/or a
10 hypothetical negotiation approach. An analytical approach is used to determine a royalty that
11 leaves the infringer with a “normal” rate of return for the use of its products embodying the trade
12 secrets or to calculate a royalty based on the increased profitability due to the use of the trade
13 secrets in Defendants’ products. In other words, an analytical approach will determine, or isolate,
14 the financial benefit or value that Defendants obtained through their misappropriation of trade
15 secrets.

16 Waymo anticipates that its expert’s determination of reasonable royalty damages under an
17 analytical approach or a hypothetical negotiation approach will be based on, among other things,
18 analysis of sales and profit projections, analyst forecasts, profitability information and other
19 documents and records produced by Waymo, Defendants, and third parties. In addition to the
20 foregoing, Waymo’s expert may utilize documents and materials referred to and recognized as
21 relevant to the determination of the cost savings achieved by the Defendants due to their
22 misappropriation. In addition to the foregoing, Waymo’s expert may utilize documents and
23 materials referred to and recognized as relevant to the determination of a reasonable royalty or
24 other damages computations in cases such as *Georgia-Pacific*, among others.

25 At present, Waymo’s understanding of the primary considerations that Waymo’s expert
26 will analyze with respect to the hypothetical negotiation approach are summarized below.

27 *Impact on Waymo’s future expected profits* - Waymo expects that its future success is
28 critically dependent on its technological lead in autonomous vehicles. (WAYMO-UBER-

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00004108-131 at ‘109, ‘111; Chu Tr. 12:3-7, 45:19-24) Defendants’ misappropriation of Waymo’s trade secrets shortens the technological lead that Waymo has in autonomous vehicles. For example, when considering the acquisition of Ottomotto and Otto Trucking, Uber estimated that Otto’s technology could shorten its autonomous vehicle timeline by one to two years. (UBER00069030-033 at ‘033.) Moreover, if Uber does not exercise its Call Option with respect to Otto Trucking, yet another Waymo competitor will have had the benefit of Waymo’s misappropriated trade secrets. Given the importance of Waymo’s technological lead, this would likely have a significant impact on its ability to earn profits.

Waymo’s policy to protect and maintain its trade secrets – Waymo has sought to protect its trade secrets and has not disclosed the trade secrets to third parties, and it has not licensed its trade secrets. Waymo takes robust measures to protect its LiDAR trade secrets. As a condition of employment, Waymo requires all employees to enter into written agreements to maintain the confidentiality of proprietary and trade secret information, and not to misuse such information. Waymo also enforces an employee code of conduct that explains employees’ strict obligations to maintain the secrecy of confidential information, and requires employee training in security procedures. Droz Decl. ¶ 30.

Waymo also takes reasonable measures to mark confidential and proprietary information, such as documents and other materials, with visible legends designating them as such when sharing them outside of Waymo, subject to NDAs or other confidentiality agreements. Disclosures to vendors are limited to the subject matter necessary for the vendor’s engagement and do not reveal the entirety of a given LiDAR system or design. Waymo employs reasonable efforts to secure physical facilities by restricting access and employing locks, cameras, guards, and other security measures. *Id.* ¶¶ 33-37; Janosko Decl. ¶ 22.

Waymo uses Subversion (SVN) — a revision control system — to store its electrical design information. All traffic (both ingress to and egress from) the SVN repository is encrypted. All traffic is authenticated against a list of authorized users before access to the repository is granted, and users do not share credentials — all accesses are unique to specific users. Access control lists are audited monthly and stale users are aggressively purged. The SVN server is

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1 password protected and accessible through specialized software. *Id.* ¶¶ 23-25. Additionally,
2 Waymo imposes network security measures and access policies that restrict the access and
3 dissemination of certain confidential and proprietary trade secret information to only teams that
4 are working on projects related to that information. For example, Google employees working on
5 projects with no relation to Waymo or self-driving cars could not (and cannot) access Waymo’s
6 confidential and proprietary schematics. They are distributed on a “need to know” basis. Droz
7 Decl. ¶ 32. Google’s networks generally are also secured through Network Access Control
8 (“NAC”) procedures, Access Control Lists (“ACLs”), and restricted access privileges. Janosko
9 Decl. ¶¶ 13-16.

10 Google employs a variety of security mechanisms to prevent network intruders or attackers
11 who may compromise Waymo’s trade secret information. Google also secures employees’ devices
12 and credentials against attacks through monitoring and logging practices, as well as regular
13 security updates. *Id.* ¶¶ 7-12, 20.

14 Google secures its production infrastructure in progressive layers starting from the physical
15 security of data centers, continuing on to the security of the hardware and software that underlie
16 the infrastructure, and finally, the technical constraints and processes in place to support
17 operational security. Google employs many hundreds of engineers dedicated to security and
18 privacy distributed across all of Google, including many who are recognized industry authorities.
19 These engineers work to protect Google’s production servers from malware utilizing tools such as
20 binary verification. Google also has an incident management process for security events that may
21 affect the confidentiality, integrity, or availability of systems or data *Id.* ¶¶ 17-21.

22 Waymo incorporates by reference its Response to Interrogatory No. 7 and all supplements
23 thereto.

24 *Competitive relationship between Waymo and Uber and Otto Trucking* – Waymo
25 recognizes that Uber is the most significant competitor in the transportation as a service (TaaS)
26 business. (WAYMO-UBER-00004175-194 at ‘184-185) Similarly, Uber recognizes Waymo is a
27 significant competitor. In fact, as discussed above, Uber has described Waymo as an existential
28 threat to its TAAS business: “This war for self-driving is truly existential for Uber: we’ll either

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1 start up our second S curve of growth or we’ll die.” (UBER00070108-110 at ‘108.) Internal Uber
2 documents indicate that Uber believes it is in intense competition with Waymo: Discussing the
3 competition with Google, Mr. Holden discusses the battle and the war: “The *battle* is about what
4 we need to do to get ourselves into a sufficiently competitive position before December that G
5 doesn’t walk away with the crown for future of ride sharing. It’s about establishing beach heads,
6 being in the game in a credible way. The *war* is the long-term defeat of G and others so we
7 afford ourselves the opportunity to extend our massive scale business into the future. This will be
8 about who gets NSD self-driving to scale first.” (UBER00070108-110 at ‘108.) If Uber does not
9 exercise its Call Option with respect to Otto Trucking, Waymo will be facing two competitors
10 who have had the benefit of Waymo’s trade secrets.

11 *Development cost savings to Uber* – As discussed in more detail above, Uber has likely
12 realized significant cost savings in terms of its development timeline. While considering the
13 acquisition of Otto, Uber recognized one important benefit was that the acquisition “decreases
14 total investment in [Autonomous Vehicle] development.” (UBER00068983) An Uber email
15 estimates that Uber’s acquisition of Otto saved Uber at least a year in the race to large scale
16 autonomous vehicle deployment, and describes Uber’s next best choice as building the team
17 internally with a two to four year lag versus what the Otto team would bring. (UBER00060147-
18 156 at ‘147.) One way to measure the costs that Defendants saved through their misappropriation
19 of Waymo’s trade secrets is by looking at the costs that Waymo incurred to develop those trade
20 secrets. As discussed in Waymo’s response to interrogatory 6, Waymo has incurred up to \$1.1
21 billion to develop the trade secrets. (See Waymo’s 7/13 Supplemental Response to Interrogatory
22 No. 6 and all supplements thereto.)

23 *Increased future expected profits to Uber and/or Otto Trucking* – As discussed above in
24 the unjust enrichment section, Uber expected that acquiring Ottomotto and Otto Trucking would
25 accelerate the development of its LiDAR technology, and under its “most conservative case,”
26 Uber estimated the increased present value of incremental profit would be between \$836 million
27 and \$1.69 billion. (UBER00069030-033 at ‘033.)
28

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1 *LiDAR system cost savings* – Waymo has obtained significant cost savings by developing
2 custom, in-house LiDAR systems using its trade secrets, and Waymo expects that by
3 misappropriating Waymo’s trade secrets, Defendants will be able to obtain similar results.
4 Waymo’s custom, in-house solution is much cheaper than options offered by third party vendors;
5 as explained in more detail above and in Waymo’s response to Interrogatory No. 6, a mid-range
6 LiDAR from Velodyne costs approximately \$70,000. By contrast, the materials needed for
7 Waymo’s own mid-range GBr3 LiDAR system, which uses the trade secrets at issue in this case,
8 cost just over \$5,000. (*See* Waymo’s Response to Interrogatory No. 6 and all supplements
9 thereto.) Uber has also recently purchased third-party LiDAR units from [REDACTED]
10 each. (UBER00086529.)

11 Due to the misappropriation of Waymo’s trade secrets, Defendants will likely benefit from
12 many years of future cost savings due to employing Waymo’s trade secrets in Uber’s LiDAR
13 systems. While considering the acquisition of Otto, Uber itself recognized the significant cost
14 savings from building custom lasers, noting savings of “up to \$45M of one-time savings (@ 1,000
15 units)” and “up to \$80M per year of ongoing savings (@ 1,000 units).” (UBER00068983.) And it
16 is clear that Uber is scaling production quickly: at the end of 2016, Uber estimated that it would
17 need approximately 120,000 to 150,000 lenses for 2017 and 500,000 for 2018. (UBER00054959-
18 962 at ‘959.) Since Uber’s LiDAR system uses 64 lenses, these estimates indicate that Uber is
19 planning to manufacture between 1,875 and 2,344 LiDAR systems in 2017, and 7,812 LiDAR
20 systems in 2018.

21 In addition, if Uber is able to deploy autonomous vehicles in its fleet, its operational costs
22 for its ridesharing business would likely drop substantially, in part because it would not have to
23 share any revenue with its drivers.

24 *Valuation of Uber’s acquisition* – As discussed above, Waymo is still obtaining discovery
25 regarding Uber’s internal valuation of Otto. However, Nina Qi testified that the Board was told
26 the overall value of the deal at the time was about \$590 million. (Qi Tr. at 100-103.)
27
28

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1 ***Unjust Enrichment / Reasonable Royalty Related To Otto Trucking's Use Of Waymo's***
 2 ***Trade Secrets (Separate From Its Acquisition And Disclosure Of Those Trade Secrets To***
 3 ***Ottomotto and Uber)***

4 Otto Trucking is also separately liable for damages with respect to its own use of Waymo’s
 5 trade secrets, including through its subsidiary Otto Transport, which currently operates trucks for
 6 the benefit of Uber’s freight program. (OTTOTRUCKING00002750.) Discovery is ongoing
 7 regarding the use of Waymo's trade secrets by Otto Trucking and its subsidiaries pending the
 8 completion of the acquisition by Uber. Waymo’s technical expert is continuing to assess
 9 Defendants’ use of Waymo’s trade secrets; such assessments will ultimately inform the damages
 10 analysis in this case. Moreover, Defendants have not yet responded to Waymo’s damages-related
 11 discovery requests. Therefore, Waymo’s expert has not concluded his analysis and is not expected
 12 to do so until the time that expert reports are due on August 24, 2017.

13 ***Punitive Damages, Attorneys Costs and Fees –***

14 Defendants’ trade secret misappropriation has been willful and malicious. If willful and
 15 malicious trade secret misappropriation exists, both CUTSA and DTSA allow punitive damages
 16 up to two times any damages award. *See* Cal. Civil Code Section § 3426.3 *and* 18 U.S.C. §
 17 1836(b)(3)(C). If willful and malicious misappropriation exists, CUTSA and DTSA also allow
 18 recovery of attorneys’ fees and costs. *See* § 3426.4 *and* 18 U.S.C. § 1836(b)(3)(D). In addition to
 19 attorneys’ fees, Waymo is also eligible to receive reasonable expert fees under CUTSA. § 3426.4.

20 While discovery is not complete and Waymo has still not seen the Stroz due diligence
 21 report (which Waymo expects will bear on this issue), the evidence to date indicates that Uber and
 22 Anthony Levandowski were in league with one another to port Waymo’s trade secrets to Uber
 23 going as far back as May 2015. (Dkt. 712, Ex. 1 (logging discussions between Uber and Mr.
 24 Levandowski beginning on May 20, 2015 “wherein Anthony Levandowski mentioned LiDAR to
 25 any officer, director, employee, agent, supplier, or consultant of defendants”).) Uber continued to
 26 meet with Mr. Levandowski throughout the fall of 2015. (Dkt. 712, Ex. 1 (logging five meetings
 27 with Mr. Levandowski regarding LiDAR between October 2015 and December 11, 2015).) Uber
 28 met with Mr. Levandowski to discuss LiDAR on the very same day that he downloaded 14,000

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1 proprietary files from Waymo servers, (Dkt. 712 Ex. 1; Dkt. 23, ¶ 44), and again a few weeks later
2 on the same day Mr. Levandowski downloaded additional proprietary information from Waymo.
3 (Ex. 263; Dkt. 24-2 ¶ 22.)

4 When Uber began meeting with Otto, Otto did not have any products. (Qi Tr. 146:8-18.)
5 Instead, Uber acquired Mr. Levandowski’s company because of its “[e]xperience w/ automotive
6 efforts of competitors”:

7 Anthony and his close team have developed several generations of mid and long
8 range laser that we now believe is critical to AV autonomy (day and night). Not
9 only do they have the several generations of experience but also know how to
10 improve on the next gen devices that they would build for us. We have yet to find
11 anyone else in the world with this know-how. . . . Second, just rubbing shoulders
12 with this team and having them advise us all over AV has a decent chance of
saving Uber at least a year off of the race to large scale AV deployment. . . . My
point is that there is more value here (considerable) than 25 disparate engineers that
we would pick up from 25 different places. This is a team that knows each other
knows the tech, knows the potholes and can jam at incredible rate (we hope) to help
solve some of our most pressing challenges.

13 (Ex. 271 at 1.) While Mr. Bares refers to the “team” that Mr. Levandowski was going to bring to
14 his new company, there was no team in place other than Mr. Levandowski and Mr. Ron at the time
15 of this email.

16 Given Uber’s scheme to buy Waymo’s “tech” and “know how” through Mr. Levandowski
17 (and the corporate entities Ottomotto and Otto Trucking), Uber began anticipating litigation with
18 Waymo almost immediately. The day after Mr. Levandowski resigned from Waymo, Uber was
19 already discussing indemnity with Mr. Levandowski and Lior Ron. (Ex. 277, January 28, 2016
20 email from Cameron Poetzsch asking Travis Kalanick, “[d]id you tell Anthony that you would
21 indemnify them if they get sued by G as part of or after the deal? They’re under that impression.”)
22 By February 5, 2016, the parties were specifically discussing indemnity for “Bad Acts,” *including*
23 “downloading of files of [Google].” (UBER00017265 at -73, Email between Uber representatives
24 and Lior Ron discussing “Timing of Indemnity / Closing Conditions,” and an “Example list of
25 Specified Bad Acts,” which included “downloading of files of [Google]”).

26 Having agreed to indemnify Mr. Levandowski for “downloading of files of [Google]” and
27 having agreed to indemnify Ottomotto and Otto Trucking for Bad Acts including trade secret
28 misappropriation, Uber then set up a forensic due diligence investigation designed specifically to

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1 uncover – or confirm – the downloaded Waymo files in Otto’s or Mr. Levandowski’s possession.
2 The existence and sheer scope of this investigation is proof enough that Uber knew Mr.
3 Levandowski had Waymo materials: it was, and remains, a process that was unprecedented for
4 Uber. (Poetzsch Tr. at 128:11-25; Qi Rough Tr. at 243:17-244:3.) As part of the investigation,
5 Stroz took and analyzed the electronic devices of five different Otto employees, including both
6 their personal and work devices. (See Ron Tr. at 96:3-19.) Despite this, the Uber witnesses
7 responsible for overseeing the investigation testified that the diligenced employees did not seem
8 upset by the scope of the investigation that Uber requested; instead, they were “okay with it.” (Qi
9 Rough Tr. at 223:22-224:6.) The most likely explanation for that is, of course, that all parties
10 already knew what Uber was looking for—stolen Waymo files.

11 Although Uber must have known about the downloaded files when it agreed to indemnify
12 Mr. Levandowski and set up the forensic investigation, Uber almost certainly found out that Mr.
13 Mr. Levandowski had downloaded materials when the diligence process got underway. To
14 motivate Mr. Levandowski to disclose *all* of his “Bad Acts” to Stroz, Uber created an elaborate
15 incentive structure: as long as Mr. Levandowski disclosed his “Bad Acts” (including
16 “downloading of files of [Google]”) to Stroz, Uber would indemnify him. (UBER00017265 at -
17 73-74; Dkt. 566 at 3.) If Mr. Levandowski did not disclose “Bad Acts” to Stroz, Levandowski
18 could not seek indemnification from Uber for those “Bad Acts” later. (*Id.*) Although Waymo has
19 still not seen the due diligence report that Stroz produced, all evidence indicates that Mr.
20 Levandowski accepted this offer and disclosed the existence of the stolen information to Uber and
21 Stroz. Defendants have never disputed that Stroz has some of the stolen information in its
22 possession as a result of the due diligence process, and Uber recently admitted that its lawyers
23 have also possessed the stolen information for over a year by virtue of their involvement in the due
24 diligence process. (Dkt. 677-8.)

25 *At the very latest*, Uber learned that Mr. Levandowski had downloaded Waymo materials
26 in his possession on March 11, 2016 when Mr. Levandowski told Uber outright. As Uber has
27 explained: “On or about March 11, 2016, Mr. Levandowski reported to [Travis] Kalanick, Nina Qi
28 and Cameron Poetzsch at Uber as well as Lior Ron that he had identified five discs in his

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1 possession containing Google information.” (Dkt. 695 at 4.) Uber’s accounting indicates that Mr.
2 Levandowski and Mr. Kalanick had a meeting to discuss LIDAR on the same day. (Dkt. 712, Ex.
3 1 at No. 63.) Since receiving this interrogatory response, Waymo has deposed three of the four
4 individuals to whom Mr. Levandowski made this admission, and all three confirmed that Mr.
5 Levandowski did indeed reveal that he had Google “stuff” in his possession during an in-person
6 meeting with Uber on March 11, 2016. (Ron Tr., 25:23-26:18; Poetzscher Tr., 249:3-250:9; Qi
7 Rough Tr., 271:11-273:20.) Uber now insists that Mr. Levandowski subsequently destroyed the
8 materials (raising other serious concerns, including concerns regarding the integrity of Stroz’s
9 investigation), but the point remains: Uber was aware of Mr. Levandowski taking confidential
10 Waymo information files as of March 11, 2016, and Uber acquired Mr. Levandowski’s company
11 anyway. And even after finding out that he had Waymo materials in his possession on March 11,
12 2016, Uber *never* took *any* steps to prohibit Mr. Levandowski from using his “treasure trove of
13 files” in his work at Uber.

14 Waymo also seeks prejudgment interest on the damages awarded for the misappropriation
15 of trade secrets at the California statutory prejudgment interest rate of seven percent (7%).
16

17 INTERROGATORY NO. 11:

18 Identify all facts supporting your contention that Waymo owns each of the alleged trade
19 secrets identified in Waymo’s 2019 Disclosure.
20

21 RESPONSE TO INTERROGATORY NO. 11:

22 Waymo incorporates by reference its General Objections. Waymo further objects to this
23 interrogatory on the grounds that it is overbroad, unduly burdensome, and oppressive, including to
24 the extent that it asks Waymo to “identify all facts.” Waymo further objects to this request to the
25 extent it is compound, complex, and contains multiple subparts.

26 Subject to and without waiving the foregoing General and Specific Objections, Waymo
27 responds as follows:
28

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1 DATED: July 25, 2017

QUINN EMANUEL URQUHART & SULLIVAN,
LLP

By /s/ Charles K. Verhoeven

Charles K. Verhoeven
Attorneys for WAYMO LLC

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EXHIBIT 16

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OF DOCUMENT
SOUGHT TO BE SEALED**

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Attorneys for Defendants
 UBER TECHNOLOGIES, INC.
 and OTTOMOTTO LLC

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

WAYMO LLC,

 Plaintiff,

 v.

 UBER TECHNOLOGIES, INC.,
 OTTOMOTTO LLC; OTTO TRUCKING LLC,

 Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANTS UBER
 TECHNOLOGIES, INC. AND
 OTTOMOTTO LLC'S OBJECTIONS
 AND RESPONSES TO WAYMO'S
 THIRD SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS
 (NOS. 153-265)**

Trial Date: October 2, 2017

REQUEST FOR PRODUCTION NO. 199:

DOCUMENTS sufficient to show [REDACTED]

RESPONSE TO REQUEST FOR PRODUCTION NO. 199:

Defendants have made available for inspection Uber's facilities, email, computers, documents, design files, and source code in San Francisco and Pittsburgh on eight occasions. In doing so, Uber has made available for inspection over 383,000 emails and documents; the devices of Scott Boehmke, John Bares, Anthony Levandowski, Gaetan Pennecot, Daniel Gruver, and James Haslim; and all four locations at which there is ongoing LiDAR development. To date, Waymo has conducted approximately 55 hours of inspection, with additional requests for investigation.

Defendants will produce non-privileged documents, if such documents exist and can be located through a reasonably diligent search, sufficient to show [REDACTED]

To the extent this Request seeks anything other than the previously described information, Defendants object to this Request as unreasonably overbroad, irrelevant, outside the scope of this litigation, harassing, and not proportional to the needs of the case, including to the extent that it requests information about LiDAR designs developed by third-parties and/or implicates non-disclosure agreements with third parties. Defendants further object to this Request to the extent that it seeks information protected by the attorney-client privilege or the work product doctrine or that is otherwise privileged or protected from discovery. Defendants further object to this Request on the ground that the phrase "considered or implemented" is vague and ambiguous.

REQUEST FOR PRODUCTION NO. 200:

DOCUMENTS sufficient to show all self-driving car test scenarios that informed, drove, or influenced any LiDAR design considered or implemented by DEFENDANTS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 200:

Defendants have already produced documents responsive to this Request, including without limitation, documents produced in connection with Notices of Deposition for Asheem Linaval. Specifically, Defendants produced PowerPoint presentations, notes, and calculations from the custodial files of Scott Boehmke.

In addition, Defendants have made available for inspection Uber's facilities, email, computers, documents, design files, and source code in San Francisco and Pittsburgh on eight occasions. In doing so, Uber has made available for inspection over 383,000 emails and documents; the devices of Scott Boehmke, John Bares, Anthony Levandowski, Gaetan Pennecot, Daniel Gruver, and James Haslim; and all four locations at which there is ongoing LiDAR development. To date, Waymo has conducted approximately 55 hours of inspection, with additional requests for investigation.

Defendants will produce additional non-privileged documents, if such documents exist and can be located through a reasonably diligent search, sufficient to show additional self-driving test scenarios used for Defendants' LiDAR designs.

To the extent this Request seeks anything other than the previously described information, Defendants also object to this Request as unreasonably overbroad, irrelevant, outside the scope of this litigation, harassing, and not proportional to the needs of the case, including to the extent that it requests information about LiDAR designs developed by third-parties and/or implicates non-disclosure agreements with third parties. Defendants also object to this Request as overbroad, unduly burdensome, and not proportional to the needs of the case to the extent that it seeks "all" "self-driving car test scenarios[.]" Defendants further object to this Request to the extent that it seeks information protected by the attorney-client privilege or the work product doctrine or that is otherwise privileged or protected from discovery. Defendants further object to the use of the phrases "self-driving car test scenarios," "informed, drove, or influenced," and "considered or implemented" are vague and ambiguous.

EXHIBIT 1

UNREDACTED VERSION

OF DOCUMENT

SOUGHT TO BE SEALED

From: [Jordan Jaffe](#)
To: [Kim Rudy Y.](#); [Felipe Corredor](#); [UberWaymoMoFoAttorneys](#); [BSF_EXTERNAL_UberWaymoLit@bsfllp.com](#); [DG-GPOttoTruckingWaymo@goodwinlaw.com](#)
Cc: [QE-Waymo](#); [John Cooper](#); [Matthew Cate](#)
Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing
Date: Sunday, August 06, 2017 9:56:58 PM

- External Email -

WAYMO HIGHLY CONFIDENTIAL INFORMATION / ATTORNEYS EYES ONLY

Rudy,

Your concerns are misplaced. In the first instance, Defendants have had Waymo's full list of 121 trade secrets, including Trade Secret Nos. 25, 90, 96, and 111, since Waymo's filing of its motion for a preliminary injunction nearly five months ago. However, never before have you raised concern that the description of those trade secrets, or any other trade secrets on Waymo's trade secret disclosure under CCP section 2019.210, are "vague and/or overbroad." Defendants have thus waived any contention that Waymo's formulation of its trade secrets lack the requisite particularity, and your belated concerns on that issue are misplaced. Indeed, at the March 16 hearing in this case, Judge Alsup told Defendants that "there is a [trade secret] list, and we have got to go forward. And you can't hold back and say: Oh, no, we don't know this, we don't know that." Mar. 16, 2017 Hearing Tr. at 19:24-20:1.

Moreover, even considering your concerns about Trade Secret Nos. 25, 90, 96, and 111 on the merits, your stated concerns are meritless. Trade Secret Nos. 25, 90, and 96 relate to specific cited documents that provide great detail and particularity as to each of those trade secrets.

As to Trade Secret No. 25, your assertion that the three specific, detailed cited documents contain "general concepts in the public domain" is meritless. The information contained in those documents is Waymo's trade secret information. [REDACTED]

[REDACTED] (Jaffe Ex. 3 at 1), is highly confidential trade secret information derived from Waymo's years of self-driving car experience. [REDACTED]

[REDACTED] is similarly highly confidential trade secret information that could only have been arrived at thanks to Waymo's years of self-driving car experience. As but one example, [REDACTED]

[REDACTED] (Jaffe Ex. 3 at 1), is as specific as it gets—and such information amounts to Waymo's highly confidential trade secrets. The three documents are filled with such [REDACTED]

[REDACTED] None of this information is a "general concept[]" in the public domain," and all of that information is specific and particular.

As to Trade Secret No. 90, we don't understand how one can be accused of "broadly claim[ing]" information contained in a six-page document—one that no one disputes that Mr. Levandowski personally downloaded on his way out the door of Waymo. The technical details regarding Waymo's custom fiber laser design as reflected in the cited presentation is a trade secret. Indeed, all of Waymo's specific implementations of its custom fiber lasers are its trade secrets—including the implementation reflected in Trade Secret Nos. 48 and 90.

As to Trade Secret No. 96, it is again not credible to claim that it "broadly claims 'design schematics and layouts contained in' a folder containing **detailed engineering schematics**." By your own admission, this trade secret covers "detailed engineering schematics" and is thus a very detailed and particularized trade secret. Waymo's

specific implementation of a LiDAR transmit board reflected in those schematics is a trade secret, and one example of the 14,000 files that Mr. Levandowski personally downloaded and Uber has misappropriated.

Indeed, as to both Trade Secret Nos. 90 and 96, the Court has already noted that Waymo's specific implementation of its LiDAR designs unquestionably qualify as trade secrets. *See, e.g.*, May 3, 2017 Sealed Morning Hearing Tr. at 15:16-22 ("All right. Well, I'm telling you, you're in a lot of trouble with that because I came up with a very simple example right off the bat that would fit that and it's not -- that's something so obvious to the -- to a seventh grader, wherever you get trigonometry, that, I don't know, your -- however, your specific implementation, I think, would be a trade secret."); May 3, 2017 Sealed Afternoon Hearing Tr. at 44:11-13 ("Trade secrets are about how you implement your design. It doesn't have to be -- qualify for a patent. It's about implementation.").

Finally, as to Trade Secret No. 111, Waymo's trade secret disclosure describes that the specific know-how was tied to [REDACTED] and further explains that this know-how includes [REDACTED] Waymo's trade secret disclosure thus provides great detail and particularity as to [REDACTED] —highly confidential information that is very valuable to Defendants and other competitors.

We trust this lays your concerns to rest. If not, we are available to meet and confer on Monday.

Best regards,

Jordan R. Jaffe

From: Jordan Jaffe

Sent: Saturday, August 05, 2017 8:37 AM

To: Kim, Rudy Y. <RudyKim@mofo.com>; Felipe Corredor <felipecorredor@quinnemanuel.com>;

UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>;

BSF_EXTERNAL_UberWaymoLit@bsflp.com; DG-GPOttoTruckingWaymo@goodwinlaw.com

Cc: QE-Waymo <qewaymo@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>

Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

Rudy,

Confirming receipt of your Friday evening email. It raises new issues concerning the descriptions of trade secrets that have been in Uber's possession for approximately five months now. Nevertheless, we are preparing a response as expeditiously as possible given the timing of your email.

Best regards,

Jordan R. Jaffe // Quinn Emanuel // 415.498.0556 // jordanjaffe@quinnemanuel.com

From: [Kim, Rudy Y.](#)

Sent: Friday, August 4, 2017 8:44 PM

To: [Felipe Corredor](#); [UberWaymoMoFoAttorneys](#); [BSF_EXTERNAL_UberWaymoLit@bsflp.com](#); [DG-GPOttoTruckingWaymo@goodwinlaw.com](#)

Cc: [QE-Waymo](#); [John Cooper](#); [Matthew Cate](#)

Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

Quinn Team:

We write to confer regarding the nine trade secrets that you identified on Tuesday. That was supposed to be a list of specific, particularized trade secrets to streamline this case for trial. Instead, at least four of them are vague and/or overbroad and do not give us adequate opportunity to prepare our defense for trial. The concerns we have are as follows:

- **Trade Secret No. 25** – broadly claims [REDACTED] in those documents. Much of the disclosures in those documents appear to be general concepts in the public domain, and Waymo has not specified what specific information it considers to be its trade secret.
- **Trade Secret No. 90** – broadly claims “the technical information contained in” a six page document, without identifying what specific information Waymo contends is a trade secret. At the very minimum, Waymo should confirm that it no longer contends that Trade Secret No. 48 (which is arguably subsumed in Trade Secret No. 90) is a trade secret, which has been confirmed by Waymo’s own witnesses at deposition. Waymo should further identify what else is contained in the six page document that it contends is a trade secret.
- **Trade Secret No. 96** – broadly claims “design schematics and layouts contained in” a folder containing detailed engineering schematics. Waymo fails to identify with particularity what aspects of those detailed design schematics and layouts it considers to be its trade secret, and what specific elements it intends to argue were misappropriated at trial. This appears to be a deliberate attempt to circumvent Judge Alsup’s order by including a broad catchall “trade secret” that encompasses other trade secrets (e.g., Trade Secret 1, Trade Secret 4, Trade Secret 5, Trade Secret 6, Trade Secret 8, Trade Secret 15, etc.)
- **Trade Secret No. 111** – broadly claims “know-how regarding the risks and costs” of a particular LiDAR design that Waymo apparently tried and abandoned. Waymo fails to identify with particularity what specific “know-how” it considers to be a trade secret and what specific elements it intends to argue was misappropriated at trial.

I am available to confer with you at any time this weekend. Given how close we are to trial, we will file a motion to strike these secrets if they are not withdrawn or clarified.

I look forward to conferring with you. Please clarify your alleged trade secrets and let me know what time this weekend you are available to confer.

Rudy

From: Felipe Corredor [<mailto:felipecorredor@quinnemanuel.com>]
Sent: Tuesday, August 01, 2017 11:40 PM
To: UberWaymoMoFoAttorneys; BSF_EXTERNAL_UberWaymoLit@bsfilp.com; DG-GPOttoTruckingWaymo@goodwinlaw.com
Cc: QE-Waymo; John Cooper; Matthew Cate
Subject: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

- External Email -

Counsel and Special Master Cooper,

Please see attached.

Regards,
Felipe

Felipe Corredor

Associate,

Quinn Emanuel Urquhart & Sullivan, LLP

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EXHIBIT 16

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Attorneys for Defendants
 UBER TECHNOLOGIES, INC.
 and OTTOMOTTO LLC

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

WAYMO LLC,

 Plaintiff,

 v.

 UBER TECHNOLOGIES, INC.,
 OTTOMOTTO LLC; OTTO TRUCKING LLC,

 Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANTS UBER
 TECHNOLOGIES, INC. AND
 OTTOMOTTO LLC'S OBJECTIONS
 AND RESPONSES TO WAYMO'S
 THIRD SET OF REQUESTS FOR
 PRODUCTION OF DOCUMENTS
 (NOS. 153-265)**

Trial Date: October 2, 2017

REQUEST FOR PRODUCTION NO. 199:

DOCUMENTS sufficient to show [REDACTED]

RESPONSE TO REQUEST FOR PRODUCTION NO. 199:

Defendants have made available for inspection Uber's facilities, email, computers, documents, design files, and source code in San Francisco and Pittsburgh on eight occasions. In doing so, Uber has made available for inspection over 383,000 emails and documents; the devices of Scott Boehmke, John Bares, Anthony Levandowski, Gaetan Pennecot, Daniel Gruver, and James Haslim; and all four locations at which there is ongoing LiDAR development. To date, Waymo has conducted approximately 55 hours of inspection, with additional requests for investigation.

Defendants will produce non-privileged documents, if such documents exist and can be located through a reasonably diligent search, sufficient to show [REDACTED]

To the extent this Request seeks anything other than the previously described information, Defendants object to this Request as unreasonably overbroad, irrelevant, outside the scope of this litigation, harassing, and not proportional to the needs of the case, including to the extent that it requests information about LiDAR designs developed by third-parties and/or implicates non-disclosure agreements with third parties. Defendants further object to this Request to the extent that it seeks information protected by the attorney-client privilege or the work product doctrine or that is otherwise privileged or protected from discovery. Defendants further object to this Request on the ground that the phrase "considered or implemented" is vague and ambiguous.

REQUEST FOR PRODUCTION NO. 200:

DOCUMENTS sufficient to show all self-driving car test scenarios that informed, drove, or influenced any LiDAR design considered or implemented by DEFENDANTS.

RESPONSE TO REQUEST FOR PRODUCTION NO. 200:

Defendants have already produced documents responsive to this Request, including without limitation, documents produced in connection with Notices of Deposition for Asheem Linaval. Specifically, Defendants produced PowerPoint presentations, notes, and calculations from the custodial files of Scott Boehmke.

In addition, Defendants have made available for inspection Uber's facilities, email, computers, documents, design files, and source code in San Francisco and Pittsburgh on eight occasions. In doing so, Uber has made available for inspection over 383,000 emails and documents; the devices of Scott Boehmke, John Bares, Anthony Levandowski, Gaetan Pennecot, Daniel Gruver, and James Haslim; and all four locations at which there is ongoing LiDAR development. To date, Waymo has conducted approximately 55 hours of inspection, with additional requests for investigation.

Defendants will produce additional non-privileged documents, if such documents exist and can be located through a reasonably diligent search, sufficient to show additional self-driving test scenarios used for Defendants' LiDAR designs.

To the extent this Request seeks anything other than the previously described information, Defendants also object to this Request as unreasonably overbroad, irrelevant, outside the scope of this litigation, harassing, and not proportional to the needs of the case, including to the extent that it requests information about LiDAR designs developed by third-parties and/or implicates non-disclosure agreements with third parties. Defendants also object to this Request as overbroad, unduly burdensome, and not proportional to the needs of the case to the extent that it seeks "all" "self-driving car test scenarios[.]" Defendants further object to this Request to the extent that it seeks information protected by the attorney-client privilege or the work product doctrine or that is otherwise privileged or protected from discovery. Defendants further object to the use of the phrases "self-driving car test scenarios," "informed, drove, or influenced," and "considered or implemented" are vague and ambiguous.

EXHIBIT 1

UNREDACTED VERSION

OF DOCUMENT

SOUGHT TO BE SEALED

From: [Jordan Jaffe](#)
To: [Kim Rudy Y.](#); [Felipe Corredor](#); [UberWaymoMoFoAttorneys](#); [BSF_EXTERNAL](#); [UberWaymoLit@bsfllp.com](#); [DG-GPOttoTruckingWaymo@goodwinlaw.com](#)
Cc: [QE-Waymo](#); [John Cooper](#); [Matthew Cate](#)
Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing
Date: Sunday, August 06, 2017 9:56:58 PM

- External Email -

WAYMO HIGHLY CONFIDENTIAL INFORMATION / ATTORNEYS EYES ONLY

Rudy,

Your concerns are misplaced. In the first instance, Defendants have had Waymo's full list of 121 trade secrets, including Trade Secret Nos. 25, 90, 96, and 111, since Waymo's filing of its motion for a preliminary injunction nearly five months ago. However, never before have you raised concern that the description of those trade secrets, or any other trade secrets on Waymo's trade secret disclosure under CCP section 2019.210, are "vague and/or overbroad." Defendants have thus waived any contention that Waymo's formulation of its trade secrets lack the requisite particularity, and your belated concerns on that issue are misplaced. Indeed, at the March 16 hearing in this case, Judge Alsup told Defendants that "there is a [trade secret] list, and we have got to go forward. And you can't hold back and say: Oh, no, we don't know this, we don't know that." Mar. 16, 2017 Hearing Tr. at 19:24-20:1.

Moreover, even considering your concerns about Trade Secret Nos. 25, 90, 96, and 111 on the merits, your stated concerns are meritless. Trade Secret Nos. 25, 90, and 96 relate to specific cited documents that provide great detail and particularity as to each of those trade secrets.

As to Trade Secret No. 25, your assertion that the three specific, detailed cited documents contain "general concepts in the public domain" is meritless. The information contained in those documents is Waymo's trade secret information. [REDACTED]

[REDACTED] (Jaffe Ex. 3 at 1), is highly confidential trade secret information derived from Waymo's years of self-driving car experience. [REDACTED]

[REDACTED] is similarly highly confidential trade secret information that could only have been arrived at thanks to Waymo's years of self-driving car experience. As but one example, [REDACTED]

[REDACTED] (Jaffe Ex. 3 at 1), is as specific as it gets—and such information amounts to Waymo's highly confidential trade secrets. The three documents are filled with such [REDACTED]

[REDACTED] None of this information is a "general concept[] in the public domain," and all of that information is specific and particular.

As to Trade Secret No. 90, we don't understand how one can be accused of "broadly claim[ing]" information contained in a six-page document—one that no one disputes that Mr. Levandowski personally downloaded on his way out the door of Waymo. The technical details regarding Waymo's custom fiber laser design as reflected in the cited presentation is a trade secret. Indeed, all of Waymo's specific implementations of its custom fiber lasers are its trade secrets—including the implementation reflected in Trade Secret Nos. 48 and 90.

As to Trade Secret No. 96, it is again not credible to claim that it "broadly claims 'design schematics and layouts contained in' a folder containing **detailed engineering schematics**." By your own admission, this trade secret covers "detailed engineering schematics" and is thus a very detailed and particularized trade secret. Waymo's

specific implementation of a LiDAR transmit board reflected in those schematics is a trade secret, and one example of the 14,000 files that Mr. Levandowski personally downloaded and Uber has misappropriated.

Indeed, as to both Trade Secret Nos. 90 and 96, the Court has already noted that Waymo's specific implementation of its LiDAR designs unquestionably qualify as trade secrets. *See, e.g.*, May 3, 2017 Sealed Morning Hearing Tr. at 15:16-22 ("All right. Well, I'm telling you, you're in a lot of trouble with that because I came up with a very simple example right off the bat that would fit that and it's not -- that's something so obvious to the -- to a seventh grader, wherever you get trigonometry, that, I don't know, your -- however, your specific implementation, I think, would be a trade secret."); May 3, 2017 Sealed Afternoon Hearing Tr. at 44:11-13 ("Trade secrets are about how you implement your design. It doesn't have to be -- qualify for a patent. It's about implementation.").

Finally, as to Trade Secret No. 111, Waymo's trade secret disclosure describes that the specific know-how was tied to [REDACTED] and further explains that this know-how includes [REDACTED] Waymo's trade secret disclosure thus provides great detail and particularity as to [REDACTED] —highly confidential information that is very valuable to Defendants and other competitors.

We trust this lays your concerns to rest. If not, we are available to meet and confer on Monday.

Best regards,

Jordan R. Jaffe

From: Jordan Jaffe

Sent: Saturday, August 05, 2017 8:37 AM

To: Kim, Rudy Y. <RudyKim@mofo.com>; Felipe Corredor <felipecorredor@quinnemanuel.com>;

UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>;

BSF_EXTERNAL_UberWaymoLit@bsflp.com; DG-GPOttoTruckingWaymo@goodwinlaw.com

Cc: QE-Waymo <qewaymo@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>

Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

Rudy,

Confirming receipt of your Friday evening email. It raises new issues concerning the descriptions of trade secrets that have been in Uber's possession for approximately five months now. Nevertheless, we are preparing a response as expeditiously as possible given the timing of your email.

Best regards,

Jordan R. Jaffe // Quinn Emanuel // 415.498.0556 // jordanjaffe@quinnemanuel.com

From: [Kim, Rudy Y.](#)

Sent: Friday, August 4, 2017 8:44 PM

To: [Felipe Corredor](#); [UberWaymoMoFoAttorneys](#); [BSF_EXTERNAL_UberWaymoLit@bsflp.com](#); [DG-GPOttoTruckingWaymo@goodwinlaw.com](#)

Cc: [QE-Waymo](#); [John Cooper](#); [Matthew Cate](#)

Subject: RE: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

Quinn Team:

We write to confer regarding the nine trade secrets that you identified on Tuesday. That was supposed to be a list of specific, particularized trade secrets to streamline this case for trial. Instead, at least four of them are vague and/or overbroad and do not give us adequate opportunity to prepare our defense for trial. The concerns we have are as follows:

- **Trade Secret No. 25** – broadly claims [REDACTED] in those documents. Much of the disclosures in those documents appear to be general concepts in the public domain, and Waymo has not specified what specific information it considers to be its trade secret.
- **Trade Secret No. 90** – broadly claims “the technical information contained in” a six page document, without identifying what specific information Waymo contends is a trade secret. At the very minimum, Waymo should confirm that it no longer contends that Trade Secret No. 48 (which is arguably subsumed in Trade Secret No. 90) is a trade secret, which has been confirmed by Waymo’s own witnesses at deposition. Waymo should further identify what else is contained in the six page document that it contends is a trade secret.
- **Trade Secret No. 96** – broadly claims “design schematics and layouts contained in” a folder containing detailed engineering schematics. Waymo fails to identify with particularity what aspects of those detailed design schematics and layouts it considers to be its trade secret, and what specific elements it intends to argue were misappropriated at trial. This appears to be a deliberate attempt to circumvent Judge Alsup’s order by including a broad catchall “trade secret” that encompasses other trade secrets (e.g., Trade Secret 1, Trade Secret 4, Trade Secret 5, Trade Secret 6, Trade Secret 8, Trade Secret 15, etc.)
- **Trade Secret No. 111** – broadly claims “know-how regarding the risks and costs” of a particular LiDAR design that Waymo apparently tried and abandoned. Waymo fails to identify with particularity what specific “know-how” it considers to be a trade secret and what specific elements it intends to argue was misappropriated at trial.

I am available to confer with you at any time this weekend. Given how close we are to trial, we will file a motion to strike these secrets if they are not withdrawn or clarified.

I look forward to conferring with you. Please clarify your alleged trade secrets and let me know what time this weekend you are available to confer.

Rudy

From: Felipe Corredor [<mailto:felipecorredor@quinnemanuel.com>]
Sent: Tuesday, August 01, 2017 11:40 PM
To: UberWaymoMoFoAttorneys; BSF_EXTERNAL_UberWaymoLit@bsfilp.com; DG-GPOttoTruckingWaymo@goodwinlaw.com
Cc: QE-Waymo; John Cooper; Matthew Cate
Subject: Waymo v. Uber - Waymo's notice regarding trade secret narrowing

- External Email -

Counsel and Special Master Cooper,

Please see attached.

Regards,
Felipe

Felipe Corredor

Associate,

Quinn Emanuel Urquhart & Sullivan, LLP

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